ne Court, U.S.
LED

No. 04 356

SEP 13 2004
OFFICE OF THE CLERK

In The
Supreme Court of the United States

OSCAR W. EGERVARY,
Petitioner,

v.

VIRGINIA YOUNG, JAMES SCHULER, FREDERICK P. ROONEY, JAMES J. BURKE, JEFFREY C. NALLIN, AND JOHN DOES ONE-TEN,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

PETITION FOR WRIT OF CERTIORARI

Gary L. Azorsky
Counsel of Record
Casey M. Preston
BERGER & MONTAGUE, P.C.
1622 Locust Street
Philadelphia, PA 19103
(215) 875-3000

Counsel for Petitioner

THE LEX GROUP • 1108 East Main Street • Suite 1400 • Richmond, Virginia 23219
(804) 644-4419 • (800) 856-4419 • Fax: (804) 644-3660 • www.thelexgroup.com

QUESTION PRESENTED

Whether the Third Circuit properly extended absolute immunity from damages liability to federal officers and persons acting under color of federal law who presented or assisted in the presentation of a warrant to a district court and then executed or assisted in the execution of the warrant and who knew or should have known that execution of the warrant would result in a violation of a citizen's Fifth Amendment right to procedural due process of law, where such immunity is not firmly rooted in the common law and where absolute immunity is inconsistent with the purposes of *Bivens v. Six Unknown Agents of the Federal Bureau of Narcotics.*

TABLE OF CONTENTS

Page

QUESTION PRESENTED i

TABLE OF CONTENTS ii

TABLE OF AUTHORITIES iii

OPINIONS BELOW 1

STATEMENT OF JURISDICTION 1

PROVISION INVOLVED 2

STATEMENT OF THE CASE 2

A. The Warrant in Lieu of Writ of Habeas Corpus and Its Execution 2

B. The District Court Proceedings 5

C. The Decision by the Court of Appeals 6

REASONS FOR GRANTING THE WRIT 8

THE THIRD CIRCUIT DISREGARDED FUNDAMENTAL PRECEDENT IN EXTENDING ABSOLUTE IMMUNITY TO GOVERNMENT ACTORS WHO OBTAIN AND EXECUTE UNCONSTITUTIONAL WARRANTS 9

CONCLUSION 14

APPENDIX

TABLE OF AUTHORITIES

Page(s)

Cases:

Antoine v. Byers & Anderson, Inc.,
508 U.S. 429 (1993) 11

Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics,
403 U.S. 388 (1971) ..... *passim*

Burns v. Reed,
500 U.S. 478 (1991) 11

Butz v. Economou,
438 U.S. 478 (1978) 10

Carey v. Piphus,
435 U.S. 247 (1978) 13

Correctional Services Corp. v. Malesko,
534 U.S. 61 (2001) 13

Egervary v. Young,
159 F. Supp. 2d 132 (E.D. Pa. 2001) 1

Egervary v. Young,
366 F.3d 238 (3d Cir. Apr. 30, 2004) 1

Groh v. Ramirez,
__ U.S. __, 124 S. Ct. 1284 (Feb. 24, 2004) 7

Harlow v. Fitzgerald,
457 U.S. 800 (1982) 10, 11

Imbler v. Pachtman,
424 U.S. 409 (1976) 9-10

Jordan v. Fox, Rothschild, O'Brien & Frankel,
20 F.3d 1250 (3d Cir. 1994) 5

Malley v. Briggs,
475 U.S. 335 (1986) 7, 10, 12

Monroe v. Pape,
365 U.S. 167 (1961) 7

Owen v. City of Independence,
445 U.S. 622 (1980) 10

Richardson v. McKnight,
521 U.S. 399 (1997) 10

Tower v. Glover,
467 U.S. 914 (1984) 10

Wyatt v. Cole,
504 U.S. 158 (1992) 10, 12

Constitutional Provision:

U.S. CONST. amend. V ..... i, 2, 5, 6

Statutes:

28 U.S.C. § 1254(1) 1

28 U.S.C. § 1292(b) 6

28 U.S.C. § 1331 5

42 U.S.C. § 1983 ..... *passim*

42 U.S.C. § 11601, *et seq.* 3

Other Authority:

Hague Convention on the Civil Aspects of International Child Abduction 3

OPINIONS BELOW

The opinion of the Court of Appeals for the Third Circuit, which is reported as *Egervary v. Young*, 366 F.3d 238 (3d Cir. Apr. 30, 2004), is reprinted in the Appendix to this petition ("Pet. App.") at A1. The Third Circuit's opinion reversed an order and opinion of the United States District Court for the Eastern District of Pennsylvania, which had denied summary judgment to respondents Young and Schuler. The District Court's opinion is reported as *Egervary v. Young*, 159 F. Supp. 2d 132 (E.D. Pa. 2001) and along with related orders is reprinted at Pet. App. B1, C1 and D1. The Third Circuit's opinion also reversed the District Court's order and opinion denying summary judgment to respondents Rooney and Burke. The District Court's opinion is unreported and is reprinted at Pet. App. F1. In addition, the Third Circuit's opinion affirmed, on other grounds, the District Court's order and opinion granting summary judgment to respondent Nallin. The District Court's opinion is unreported and is reprinted at Pet. App. E1. The Third Circuit denied a timely petition for rehearing and suggestion of rehearing *en banc*. (*See* Pet. App. G1).

STATEMENT OF JURISDICTION

The Court of Appeals for the Third Circuit entered judgment on April 30, 2004 (*see id.* at A26) and denied rehearing and rehearing *en banc* on June 15, 2004 (*see id.* at G1). This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

PROVISION INVOLVED

The Fifth Amendment of the United States Constitution provides as follows:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

U.S. CONST. amend. V.

STATEMENT OF THE CASE

A. The Warrant in Lieu of Writ of Habeas Corpus and Its Execution.

The petitioner in this case is Oscar Egervary, a native of Hungary who emigrated to the United States in 1980 and became a United States citizen in 1987. He became romantically involved with Aniko Kovacs, a Hungarian national who came to the U.S. to study music in 1990. They were married in 1991 and established their marital residence in New Jersey. Their son, Oscar, was born on July 4, 1992. (*See* Pet. App. D4).

In February 1993, Ms. Kovacs, a concert violinist, traveled to Hungary with Oscar ostensibly to perform in a concert to be held in Budapest in March. However, despite announced intentions to return to the U.S. with Oscar in

April, Ms. Kovacs declined to return with Oscar and in fact secreted Oscar in a location unknown to petitioner. When petitioner consulted the American Embassy in Budapest, he was told that if he could find Oscar he was free to take the child back to the U.S. as they were both U.S. citizens. In December 1993, petitioner found Oscar in Budapest, took Oscar from Kovacs and returned with him to Monroe County, Pennsylvania. (*See id.* at A4, D6, F3-4).

On May 13, 1994, U.S. marshals arrived at petitioner's home with a warrant in lieu of habeas corpus signed by the Honorable William J. Nealon of the United States District Court for the Middle District of Pennsylvania, a copy of which is reprinted at Pet. App. H1-3. Pursuant to the warrant, Oscar was removed from petitioner's custody and delivered to respondent Frederick P. Rooney, Esq., who then took Oscar directly to the airport, flew him to Europe and returned him to Ms. Kovacs. Petitioner had been given no notice or opportunity to be heard prior to service of the *ex parte* warrant upon him. (*See id.* at A3, D6).

Sometime before Oscar's removal from the United States, Ms. Kovacs had sought and obtained the State Department's help in retrieving her son who, she claimed, had been kidnapped from Hungary by his father. Respondent Virginia Young of the Bureau of Consular Affairs, had contacted Mr. Rooney and asked him to represent Kovacs in filing a petition pursuant to the Hague Convention on the Civil Aspects of International Child Abduction and the International Child Abduction Remedies Act, 42 U.S.C. § 11601, *et seq.* Mr. Rooney prepared the petition and warrant with the assistance of his associate, respondent James Burke, Esq., Ms. Young and another employee of the State Department, respondent James Schuler. (*See* Pet. App. A5, D11-13, 51, 80-83).

Ms. Young supplied Mr. Rooney with model pleadings containing three separate options for effecting the return of the child, all of which suggested an initial *ex parte* proceeding without notice to the alleged parent-kidnapper, followed by seizure of the child and a prompt post-deprivation hearing with notice while the child remained in the jurisdiction. In the petition filed with the District Court, however, Mr. Rooney added a fourth option that eliminated the post-deprivation hearing. Specifically, the fourth option directed "any peace officer within the Commonwealth of Pennsylvania" to "take into protective custody Oscar Jonathan Egervary and deliver him to Petitioner's agent for immediate return to the physical custody of Petitioner." (*See id.* at A5, D88-90, H3).

On May 13, 1994, Messrs. Rooney, Burke and their local counsel, respondent Jeffrey Nallin, Esq., filed the petition with the District Court. Mr. Rooney met with Judge Nealon in chambers and convinced the judge to enter the fourth option, despite the judge's expressed misgivings. The judge, however, had been reassured that this relief was available after asking Mr. Rooney to check with the State Department, and Mr. Rooney reported that he had just spoken with Mr. Schuler and had been told that the judge had authority to order the relief requested. (*See id.* at A6-7, D15-17).

Once the warrant had been signed by the judge, Messrs. Rooney and Burke sought out the U.S. marshals to assist them in executing it. The attorneys waited in a car parked on a public road outside of petitioner's residence while the federal marshals retrieved the child. The marshals brought the child to Messrs. Rooney and Burke, who immediately drove the child to Newark International Airport. The State Department assisted Messrs. Rooney and Burke in arranging to fly Oscar out of the country without a passport, whereupon Mr. Rooney removed the child from the United States. (*See* Pet. App. A8, D24-25, 96-100).

B. The District Court Proceedings.

Petitioner sued Messrs. Rooney, Burke and Nallin as well as the State Department officials Young, Schuler and John Does One-Ten under *Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics*, 403 U.S. 388 (1971) (*Bivens*), alleging the violation of his most fundamental due process right to notice and an opportunity to be heard directly under the Fifth Amendment, as well as under the common law claim of civil conspiracy. The principal *Bivens* claim was that, pursuant to *Jordan v. Fox, Rothschild, O'Brien & Frankel*, 20 F.3d 1250 (3d Cir. 1994), the attorney respondents Rooney and Burke acted as federal agents when they, with the assistance of federal marshals, executed the unconstitutional warrant they had obtained from the court; that they could not have done so without the assistance of respondent Nallin; and that the attorney respondents and State Department respondents all acted under color of federal law in violating petitioner's fundamental right to due process of law by executing an order that they knew or should have known was unconstitutional. (*See* Pet. App. D1-105, E1-16, F1-37). Jurisdiction was founded upon 28 U.S.C. § 1331.

The convoluted procedural history of this case in the District Court is set forth at length in the lower court's opinion at Pet. App. A8-12. For purposes of this petition, the essential occurrences are the respondents' motions to dismiss and for summary judgment as well as the District Court's *sua sponte* motion for partial summary judgment against the attorney respondents with respect to liability. In their summary judgment motions, the attorney respondents asserted that there was no violation of petitioner's rights and that, even if a violation had occurred, his claim failed on grounds of waiver, collateral attack, lack of damages and immunity. In response to the District Court's *sua sponte* motion, they further asserted that they were not acting as

federal agents and that the defense of good faith precluded summary judgment. The State Department respondents filed a motion to dismiss and a motion for summary judgment asserting, *inter alia*, qualified immunity and a lack of personal involvement in the actions giving rise to petitioner's claim.

The District Court held that petitioner's Fifth Amendment right to due process had indeed been violated and that attorney respondents Rooney and Burke acted under color of federal law when they executed the warrant. The District Court therefore denied their summary judgment motion but granted the motion of respondent Nallin because he did not participate in the execution of the unconstitutional warrant. The District Court further declined to enter partial summary judgment on behalf of petitioner, concluding that the attorney respondents could assert a good faith defense for determination by the trier of fact. The District Court also denied the motions to dismiss and for summary judgment filed by the State Department respondents. The District Court then certified these and two other orders for immediate appeal pursuant to 28 U.S.C. § 1292(b), and the State Department respondents filed an appeal as of right with respect to the issue of qualified immunity. On April 5, 2002, the Third Circuit granted the petitions filed by all parties and consolidated the appeals for decision on the merits.

C. The Decision by the Court of Appeals.

With respect to the orders determining respondents' summary judgment motions, the Third Circuit reversed as to all but Mr. Nallin, affirmed the entry of summary judgement in his favor on alternative grounds, and ordered the District Court to enter summary judgment in favor of all respondents and against petitioner. (*See* Pet. App. A27). On the constitutional issue, the court of appeals agreed that due

process required notice and an opportunity to be heard, and that therefore the *ex parte* warrant was unconstitutional in that it provided petitioner with neither a pre- nor post-deprivation hearing before expatriating petitioner's child. (*See id.* at A3). However, then, without benefit of consideration or analysis of the issue by the trial court, and despite petitioner having based liability upon respondents' conduct *following* approval of the warrant, the Third Circuit determined that Judge Nealon's legally erroneous "independent" decision constituted an intervening superseding cause of petitioner's constitutional injury, thereby cutting off any causation of petitioner's injury stemming from respondents' *pre-approval* conduct in misrepresenting the applicable law to the judge. (*See id.* at A4, 23). The Third Circuit's causation analysis is in direct conflict with this Court's pronouncement in *Malley v. Briggs*, 475 U.S. 335, 345 n.7 (1986) (instructing that the judicial approval of a legally defective warrant does not "break[] the causal chain between the application for the warrant and the improvident arrest" in that Section 1983 "should be read against the background of tort liability that makes a man responsible for the natural consequences of his actions" (quoting *Monroe v. Pape*, 365 U.S. 167, 187 (1961)), and the Court's recent confirmation of the *Malley* directive in *Groh v. Ramirez*, __ U.S. __, 124 S. Ct. 1284, 1292, n.4, 1293 (Feb. 24, 2004) (rejecting ATF agent's assertion that the judge's approval of a facially defective warrant was the cause of the ensuing unconstitutional search on the ground that even if the judge knew at signing that the warrant was defective, it would have been unreasonable for the agent to rely on a warrant "so patently defective which was prepared by the agent himself") (citation omitted).

With respect to respondents' conduct *following* approval of the warrant, the court of appeals blithely dismissed any possibility of liability arising from such conduct by stating: "[B]ecause the judge's execution of the

ex parte Order superceded any prior tortious conduct by defendants *and shrouded any subsequent actions with a cloak of legitimacy*, we find no basis for imposing *Bivens* liability on any of the defendants." (Pet. App. A24) (emphasis added). With these words, and without the benefit of having undertaken any historical analysis whatsoever, the court of appeals has decided that where an attorney (or, more commonly, a police officer) can convince a judge to approve a warrant in contravention of a citizen's constitutional rights, then, so long as post-approval conduct does not violate the terms of the warrant, the actions undertaken to carry out the warrant are entitled to absolute immunity.

The Third Circuit thereafter denied a timely petition for rehearing and rehearing *en banc* (*see id.* at G1-2), and this petition for *certiorari* followed.

REASONS FOR GRANTING THE WRIT

This petition seeks to right an egregious disregard of fundamental Supreme Court precedent which left uncorrected will seriously erode the protection provided by basic constitutional guarantees. The Third Circuit's *sua sponte* decision frees government actors from any doubt that they may intentionally, and in bad faith, violate the constitutional rights of citizens. On the way to this intolerable decision, the Third Circuit ignored the well-established principle that the immunity to be accorded government actors must be recognized at common law and must be harmonious with the history and purpose of *Bivens* and 42 U.S.C. § 1983. This freewheeling expansion of absolute immunity should be summarily reversed.

The Third Circuit's decision reduces the constitutional commands to mere words lacking any teeth. An extension of absolute immunity to government actors who execute unconstitutional warrants and court orders

that were prepared and submitted for approval by the executing actors invites irresponsible and malicious lawyering and police work. The removal of the damages liability deterrent will have far-reaching implications that will undoubtably leave citizens of the Third Circuit more susceptible to the type of irremediable harm suffered by the petitioner. Left unchecked, there will be an escalation of illegal searches and seizures and unlawful deprivations of life, liberty and property similar to the removal of a child from a parent's custody and the removal of a U.S. citizen from his or her country without due process of law. Government actors cannot be pedestaled above the law, at least not before demonstrating that the function performed has historically-rooted absolute immunity and that such protection is harmonious with the purpose of *Bivens* and Section 1983.

THE THIRD CIRCUIT DISREGARDED FUNDAMENTAL PRECEDENT IN EXTENDING ABSOLUTE IMMUNITY TO GOVERNMENT ACTORS WHO OBTAIN AND EXECUTE UNCONSTITUTIONAL WARRANTS.

This Court has embodied in *Bivens* elementary principles of accountability for federal actors who violate a citizen's constitutional rights - no official is above the law, and no violation of certain fundamental constitutional rights, among which are the deprivation of life, liberty or property without due process of law, should be without a remedy. *Bivens'* rationale is that without an effective sanction for the unlawful behavior of government actors, the constitutional guarantees are nothing more than rhetoric.

Bivens and its state actor counterpart, Section 1983, created "a species of tort liability that on its face admits of no immunities." *Imbler v. Pachtman*, 424 U.S. 409, 417

(1976).[1] The Court has accorded the defense of absolute immunity to a circumscribed group of government officials "whose special functions or constitutional status requires complete protection from suit." *Harlow v. Fitzgerald*, 457 U.S. 800, 807 (1982). It is well-settled that legislators, in their legislative functions, and judges, in their judicial functions, are insulated with absolute immunity. *See id.* (citing cases). In addition, absolute immunity has been extended to certain officials of the Executive Branch, including prosecutors, executive officers engaged in adjudicative functions, and the President of the United States. *See id.* (citing cases).

This Court's jurisprudence mandates that before absolute immunity from damages liability for unconstitutional behavior will be extended to government actors, the asserted privilege must withstand a two-part inquiry. *See Wyatt v. Cole*, 504 U.S. 158, 163-64 (1992); *Malley*, 475 U.S. at 339-40. The initial inquiry is whether the "tradition of immunity was so firmly rooted in the common law and was supported by such strong policy reasons that Congress would have specifically so provided had it wished to abolish the doctrine." *Wyatt*, 504 U.S. at 164 (quoting *Owen v. City of Independence*, 445 U.S. 622, 637 (1980)). If an official was indeed accorded immunity from tort actions at common law when the Civil Rights Act was enacted in 1871, the second inquiry is whether the history and purpose of *Bivens* and Section 1983 counsel against recognizing the same immunity in these actions. *Malley*, 475 U.S. at 340 (quoting *Tower v. Glover*, 467 U.S. 914, 920 (1984)). *See also Richardson v. McKnight*, 521 U.S. 399, 404 (1997). The Court has steadfastly been "quite sparing" in recognizing absolute immunity for government officials, and has "refused to

---

[1] This case does not involve any issue concerning immunity accorded to state actors sued under Section 1983. However, as the Court stated in *Butz v. Economou*, 438 U.S. 478 (1978), it is "untenable to draw a distinction for purposes of immunity law between suits brought against state officials under § 1983 and suits brought directly under the Constitution against federal officials." 438 U.S. at 504.

extend it any further than its justification would warrant." *Burns v. Reed*, 500 U.S. 478, 486-87 (1991) (quoting *Harlow, supra*, at 811). In short, where a tradition of absolute immunity did not exist as of 1871, the Court has refused to grant immunity in the context of *Bivens* and Section 1983. *See Burns*, 500 U.S. at 498 (Scalia, J., concurring in judgment in part and dissenting in part).

In extending absolute immunity to government actors who execute unconstitutional warrants prepared and submitted by the actors for approval, the Third Circuit disregarded the fundamental principles articulated in this Court's jurisprudence. En route to creating this privilege, the Third Circuit did not point to any common law counterpart and failed to reconcile how the rule is consistent with the history and purpose of *Bivens* and Section 1983. Nor did the Third Circuit show that respondents performed a function protected with historically-rooted absolute immunity. *See, e.g., Antoine v. Byers & Anderson, Inc.*, 508 U.S. 429, 433-36 (1993) (refusing to expand absolute immunity to court reporters because there was no common law tradition of absolute immunity for court reporters or the function reporters perform).

Instead, the Third Circuit rests its entire decision concerning respondents' unconstitutional post-approval conduct on a single enigmatic sentence: "Thus, because the judge's execution of the *ex parte* Order superseded any prior tortious conduct by defendants *and shrouded any subsequent actions with a cloak of legitimacy*, we find no basis for imposing *Bivens* liability on any of the defendants." (Pet. App. at A24) (emphasis added). In the absence of a detailed examination as to whether the absolute immunity it extended to government actors who execute unconstitutional warrants was recognized in 1871, the

privilege enacted by the Third Circuit must be suspect.[2] Moreover, it belies justice, public policy, and logic to deem that an unconstitutional act, which the government actor knew or should have known was unconstitutional, is "shrouded . . . with a cloak of legitimacy" by a court's erroneous decision. Indeed, such an extension of immunity is precisely the "freewheeling policy choice[]" Justices White and Kennedy cautioned is contrary to an immunity doctrine "rooted in historical analogy." *Wyatt*, 504 U.S. at 170 (Kennedy, J., concurring) (quoting *Malley*, 45 U.S. at 342 (White, J.)).

Had the Third Circuit applied well-established precedent it would have found that common law did not recognize a privilege analogous to the rule it created. The common law torts most closely analogous to the respondents' conduct are malicious prosecution and abuse of process. As determined in *Wyatt*, at common law these torts accorded causes of action for unjustified harm arising from the misuse of governmental processes against private parties. *Wyatt*, 504 U.S. at 164. The Court decided in *Wyatt* that although common law provided public prosecutors and judges absolute immunity, complaining witnesses, who, like the respondents in this case, "set the wheels of government in motion by instigating a legal action" are not entitled to immunity from liability. *Id.* at 164-165 (citing *Malley*, 475 U.S. at 340-41).

---

[2] On its face, the Third Circuit's unsupported and ill-considered decision expands absolute immunity to all government actors who execute warrants or court orders that they obtain and know or should know are unconstitutional. A notional interpretation that the Third Circuit only extended immunity to actors who represent a private party in removing a child from a parent's custody and from the United States is likewise incongruous with basic Supreme Court jurisprudence for the same reasons that the literal expansion flies in the face of this Court's precedent.

Had the Third Circuit applied well-established precedent it would have further found that extending absolute immunity to government actors who obtain and execute unconstitutional warrants or court orders is inconsistent with the history and purpose of *Bivens* and Section 1983. The purpose of *Bivens* and Section 1983 is to deter government actors from using the "badge of their authority to deprive individuals of their federally guaranteed rights and to provide relief to victims if such deterrence fails." *Wyatt*, 504 U.S. at 161 (citing *Carey v. Piphus*, 435 U.S. 247, 254-57 (1978)); *accord Correctional Services Corp. v. Malesko*, 534 U.S. 61, 70-71 (2001).

In *Malley*, the Court refused to extend absolute immunity to a police officer who presented a state district court judge with a complaint and supporting affidavit that failed to establish probable cause. The Court explained that it interprets Section 1983 to give absolute immunity to "functions intimately associated with the *judicial* phase of the criminal process, not from an exaggerated esteem for those who perform these functions, and certainly not from a desire to shield abuses of office, but because a lesser degree of immunity could impair the judicial process itself." *Malley*, 475 U.S. at 342 (quotation and citation omitted) (emphasis in original). It is indisputable that neither government nor the American judicial process will grind to a halt if government actors who obtain and knowingly execute unconstitutional warrants are held accountable for the resulting violations of citizens' constitutional rights.

The Third Circuit's expansion of absolute immunity to respondents is manifestly incongruous with the purpose of *Bivens* and Section 1983. In direct contrast with the purpose of *Bivens* and Section 1983, the Third Circuit's decision undermines the damages liability deterrent applicable to government actors who obtain and execute warrants authorizing constitutional deprivations. Anointed

with this unrestricted badge, government actors who can convince a judge to approve an unconstitutional warrant in the Third Circuit will be free from any doubt that they may intentionally, and in bad faith, violate the constitutional rights of citizens. This expansion of immunity to these government actors will undoubtably incite abuse of authority as well as irresponsible lawyering and police work and will inevitably lead to an escalation of irremediable constitutional deprivations.

Petitioner and the citizens of the states, cities and localities comprising the Third Circuit are entitled to protection from invasion of their personal interests in life, liberty, and property against government actors and have a right to accountability when deterrence fails. Because of the importance of the preservation and vindication of constitutional guarantees, the Court should either summarily reverse the Third Circuit's decision or grant *certiorari* to examine this unexplained expansion of absolute immunity.

CONCLUSION

Petitioner respectfully requests that the decision of the Third Circuit be summarily reversed in this case. In the alternative, the petition for writ of *certiorari* should be granted to examine this unexplained expansion of absolute immunity.

Respectfully submitted,

GARY L. AZORSKY
Counsel of Record
CASEY M. PRESTON
BERGER & MONTAGUE, P.C.
1622 Locust Street
Philadelphia, PA 19103

September 13, 2004

Counsel for Petitioner

TABLE OF CONTENTS
Appendix to Petition

Page

Opinion and Judgment
United States Court of Appeals for
The Third Circuit
entered April 30, 2004 ..... A-1

Order of
The Honorable Thomas N. O'Neill, Jr.
Re: Denying the Federal Defendants' Motions to
Dismiss and for Summary Judgment; Certifying
Certain Orders for Immediate Appeal
entered January 17, 2002 ..... B-1

Order of
The Honorable Thomas N. O'Neill, Jr.
Re: Amending the January 21, 2000 Order
entered September 13, 2001 ..... C-1

Memorandum Opinion and Order of
The Honorable Thomas N. O'Neill, Jr.
Re: Staying Discovery Until Further Order and
Allowing Plaintiff 30 days to Perfect Service and
Notify Court Upon Perfection of Service
entered September 6, 2001 ..... D-1

Memorandum Opinion and Order of
The Honorable Thomas N. O'Neill, Jr.
Re: Entering Summary Judgment in Favor of
Plaintiff Egervary on Count I
entered August 15, 2000 ..... E-1

Memorandum Opinion and Order of
The Honorable Thomas N. O'Neill, Jr., J.
Re: Denying Defendants Motion for
Summary Judgment
entered January 21, 2000 ..... F-1

Order
United States Court of Appeals for
The Third Circuit
Re: Denying Petition for Rehearing
entered June 15, 2004 ..... G-1

Order of
The Honorable William J. Nealon
Re: Warrant in Lieu of Writ of Habeas Corpus
entered May 13, 1994 ..... H-1

PRECEDENTIAL

UNITED STATES COURT OF
APPEALS FOR THE THIRD CIRCUIT

Nos: 02-1284/2035/2066/2133

OSCAR W. EGERVARY

v.

VIRGINIA YOUNG; JAMES SCHULER; FREDERICK P. ROONEY, ESQUIRE; JAMES J. BURKE, ESQUIRE; JEFFREY C. NALLIN, ESQUIRE; JOHN DOES ONE-TEN

Virginia Young, James Schuler,
Appellants in No. 02-1284 & 02-2066

OSCAR W. EGERVARY,
Appellant in No. 02-2035

v.

VIRGINIA YOUNG; JAMES SCHULER; FREDERICK P. ROONEY, ESQUIRE; JAMES J. BURKE, ESQUIRE; JEFFREY C. NALLIN, ESQUIRE; JOHN DOES ONE-TEN

OSCAR W. EGERVARY

v.

VIRGINIA YOUNG; JAMES SCHULER; FREDERICK P. ROONEY, ESQUIRE; JAMES J. BURKE, ESQUIRE; JEFFREY C. NALLIN, ESQUIRE; JOHN DOES ONE-TEN

Frederick P. Rooney, Esquire, James J. Burke, Esquire,
Appellants in No. 02-2133

Appeal from the United States District Court
for the Eastern District of Pennsylvania
(D.C. Civil Action Nos.96-cv-03039)
District Judge: Honorable Thomas N. O'Neill, Jr.,

Argued on January 16, 2003

Before: ROTH, FUENTES and ALDISERT, Circuit Judges

(Opinion filed: April 30, 2004)
[Entered April 30, 2004]

Matthew M. Collette, Esquire **(Argued)**
Barbara L. Herwig, Esquire
Robert D. McCallum, Jr.,
Assistant Attorney General
Patrick L. Meehan
United States Attorney
United States Department Of Justice
Civil Division, Appellate Staff, Room 9008
601 D. Street, N.W.
Washington, DC 20530

James W. Gicking, Esquire **(Argued)**
Richard A. Kraemer, Esquire
Marshall, Dennehey & Warner, Coleman & Goggin
1845 Walnut Street, 16th Floor
Philadelphia, PA 19103

Deborah R. Popky, Esquire
Robert S. Tintner, Esquire
Fox Rothschild
2000 Market Street, 10th Floor
Philadelphia, PA 19103

Counsel for Appellants/Cross Appellees

Gary L. Azorsky, Esquire **(Argued)**
Casey Preston, Esquire
Berger & Montague
1622 Locust Street Philadelphia, PA 19103
Counsel for Appellee/Cross-Appellant

ROTH, Circuit Judge:

This appeal in a Bivens[1] action arose out of an international child custody dispute. Aniko Kovacs, a citizen and resident of Hungary, wanted to regain custody of her son, Oscar Jonathan Egervary (Oscar). The father, Oscar W. Egervary (Egervary), had taken Oscar from Hungary to Pennsylvania without Kovacs' permission. Frederick Rooney, a private attorney acting at the request and with the assistance of U.S. State Department officials, agreed to represent Kovacs in a proceeding to regain custody of Oscar. Pursuant to the International Child Abduction Remedies Act (ICARA), 42 U.S.C. § 11601, et seq., Rooney presented a petition to a United States District Judge at an ex parte hearing. During this hearing, Rooney argued successfully for the issuance of an order permitting him to enlist the aid of local law enforcement officials and U.S. Marshals in seizing and removing Oscar from the United States without notice to Egervary. It is now clear that minimal due process required notice and an opportunity to be heard. For that reason, the ex parte order was unconstitutional insofar as it permitted Oscar's removal from the United States without providing Egervary with either a pre- or post-deprivation hearing.

As a result of his son's removal, Oscar W. Egervary brought a Bivens action to recover monetary damages from Rooney as well as from his associate, James Burke, his local counsel, Jeffrey Nallin, and the two State Department officials, Virginia Young and James Schuler, who assisted

---

1 Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics, 403 U.S. 388 (1971)

Rooney in this matter.[2] The District Court granted summary judgment to Nallin but found triable issues as to the other four defendants. We granted permission to appeal. Because the order entered by the District Judge in the underlying ICARA proceeding was a superseding cause of Egervary's injury, we conclude that Egervary is unable to establish in this Bivens suit that the actions of the defendants in the custody proceeding proximately caused his harm. Thus, we will reverse the District Court's denial of summary judgment to Rooney, Burke, Young, and Schuler, and we will affirm on alternative grounds its grant of summary judgment to Nallin.

I. Facts

Plaintiff Oscar W. Egervary is a native of Hungary, who emigrated to the United States in 1980 and became a citizen in 1987. He became romantically involved with fellow Hungarian Aniko Kovacs in 1990 while she was studying in the United States. They were married in Hungary in 1991 and established their residence in New Jersey. Their son, Oscar, was born in New Jersey in July 1992.

In February 1993, Kovacs took Oscar with her on a trip to Hungary. Although they were scheduled to return to the United States in early April, Kovacs twice delayed the return trip and then informed Egervary that neither she nor Oscar would return at all. After attempts to reconcile the relationship had failed, Kovacs sent a "farewell" letter to Egervary in September 1993, stating that she and Oscar were moving to an undisclosed location within Hungary. In December of that year, Egervary went to Budapest and located Kovacs and Oscar. He took Oscar from Kovacs, against her will, and returned with him to Monroe County, Pennsylvania.

---

[2] Adopting the terminology used by the District Court, we will refer to Rooney, Burke, and Nallin collectively as the "Attorney Defendants," and will identify Young and Schuler as the "Federal Defendants."

Kovacs instituted legal proceedings in Hungary seeking Oscar's return. As a result, the Hungarian government contacted the U.S. State Department in order to obtain its assistance. On or about May 10, 1994, Young, a member of the State Department's Bureau of Consular Affairs, asked Rooney to file an ICARA petition on behalf of Kovacs. By his own admission, Rooney "was not extremely well-versed on the Hague." Nevertheless, he agreed to represent Kovacs pro bono. During the course of this representation, Rooney was in regular contact with officials at the State Department and routinely received assistance from them. The assistance provided by the Federal

Defendants included, inter alia, providing the Attorney Defendants with (1) copies of Hungarian governmental and court documents related to the case, as well as model ICARA pleadings published by the American Bar Association; (2) information regarding Oscar's location; and (3) advice on the proper preparation of the ICARA pleadings. Rooney did not have any direct contact with his client, Kovacs.

The model pleadings Rooney received from the Federal Defendants contained three separate proposed orders, all of which provided for an ex parte proceeding prior to the seizure of the child, followed by a post-deprivation hearing at which the alleged parent-kidnapper could be heard. Although Rooney used the model pleadings as the basis for his ICARA petition, he added a fourth option that would permit law enforcement officials to take Oscar "into protective custody . . . and deliver him to [Rooney] for immediate return to the physical custody of [Kovacs]." Thus, the fourth option did not provide for a post-deprivation hearing.

The Attorney Defendants filed the ICARA petition in the United States District Court for the Middle District of Pennsylvania on May 13, 1994. The petition contained all

four proposed orders. In presenting the petition to the District Court during the ex parte proceeding, Rooney argued for the fourth option, the one he had drafted himself and the only one that did not call for a hearing prior to Oscar's removal from the United States.

No court reporter was present during the ex parte proceedings so that no transcript exists. However, both Rooney and the judge were deposed in connection with the Bivens action, and both discussed their recollection of what transpired. Although Rooney and the judge agree on most points, some discrepancies exist.

Specifically, both generally agree that the judge expressed reservations as to whether he had the authority to grant the fourth option *(i.e.,* whether he could order that the child be removed from the United States without providing at least a post-deprivation hearing for the father). In view of this doubt, Rooney then called the State Department from the judge's chambers during a break in the proceedings. Rooney spoke to Schuler and asked him whether the judge had the authority to issue such an order. According to Rooney's deposition testimony, Schuler said something to the effect, "He's the judge. He can do whatever he feels is appropriate." Based on this representation from Schuler, Rooney apparently told the judge that Rooney believed the judge did in fact have the legal authority to enter such an order.

The discrepancies between Rooney's and the judge's accounts do not involve any factual aspect of the custody matter but only the legal limits of the judge's ability to act on the undisputed facts. The discrepancies center around the discussion of the ICARA pleadings and the representations made by Rooney regarding his relationship and contacts with the State Department. With respect to the ICARA pleadings, Rooney states that he and the judge discussed all four alternatives and that the judge mentioned that it was Friday and it might be difficult to contact anyone

from child protective services to take custody of Oscar. Rooney also states that he told the judge that, if the fourth option was granted, Rooney would personally take Oscar to Hungary. However, the District Court in this Bivens action has summarized the judge's testimony as follows: "Rooney: 1) portrayed himself as representing the State Department; 2) stated that he was seeking to have the Judge enforce a Hungarian court order; 3) had already made arrangements to return the child to Hungary that day; and 4) never suggested any remedy that would require [the] Judge ... to conduct a hearing on the matter."

In addition, the judge has stated that, although the other three options (all of which provided for an ex parte proceeding before the seizure of the child and then a post-deprivation hearing) were contained in the papers, they were not discussed by Rooney, who argued only for the fourth option. The judge also stated that he selected the fourth option based on what he believed to be the State Department's representation, made through Rooney, that he had the legal authority to do so:

> And as I say - maybe it's too much trust, but you're inclined to rely on the expertise of a federal department that purportedly has expertise in that area. But I did have qualms about it. I mean, I just didn't sit down and sign it. I said I want you to get an assurance that this is the appropriate thing to do.

Despite these concerns, the judge eventually entered an order selecting the Fourth Option, directing law enforcement officers to "take into protective custody OSCAR JONATHAN EGERVARY and deliver him to Petitioner's agent for immediate return to the physical custody of Petitioner" (hereinafter "the Order").

Once the Order had been signed by the judge, Rooney and Burke sought out U.S. Marshals to execute it. Upon arriving at the District Marshal's office, Rooney placed a call to the State Department to notify them of what had transpired. Rooney and Burke then followed the Deputy Marshals to Egervary's residence but did not enter the home with them. When Oscar had been removed from the residence, he was placed in Rooney's car and driven to Newark International Airport. According to Burke's testimony, Rooney was in constant contact with the State Department both during the trip to the airport and throughout the rest of the day.

During the trip to the airport, Rooney also contacted Lori Mannicci, an associate in his office, and asked her to arrange for Oscar's return to Hungary.

This not only involved making the necessary travel arrangements, but also obtaining permission from the State Department to remove Oscar from the United States without a passport. According to Mannicci's testimony, she does not remember either the name of the person with whom she spoke or the content of their conversation. However, she does have handwritten notes from the conversation that include Young's home phone number. Once the passport waiver was obtained, Rooney flew with Oscar to Frankfurt, Germany. Kovacs met them there, and Rooney turned over custody of Oscar to her at that time.

Following Oscar's removal from the United States, Egervary filed a motion for reconsideration of the Order. Egervary subsequently withdrew this motion and filed the Bivens action.

II. Procedural History

Egervary filed his original complaint in the United States District Court for Eastern District of Pennsylvania on April 17, 1996. Pursuant to Bivens, he seeks compensatory

and punitive damages, together with interest, attorney's fees, and costs from defendants Young, Schuler, Rooney, Burke, Nallin, and John Does One through Ten (the John Does are alleged to be agents or representatives of the State Department). The complaint contained both (1) a substantive Bivens claim alleging that the defendants violated Egervary's Fifth Amendment Due Process rights by taking custody of his son without a hearing, and (2) a conspiracy count.

The Federal Defendants filed a motion to dismiss and to stay discovery. On January 7, 1997, the District Court stayed discovery but declined to rule on the motion to dismiss because of concerns as to whether venue was appropriate in the Eastern District of Pennsylvania. The court therefore granted Egervary leave to file a motion to transfer the case to the Middle District of Pennsylvania pursuant to 28 U.S.C. § 1406(a) within 30 days, noting that the court would grant the Federal Defendants' motion to dismiss if Egervary failed do so.

Egervary timely moved to transfer. On April 28, 1997, the case was transferred to the Middle District and assigned to the judge who had issued the Order in the ICARA matter. However, it soon became clear that that judge might be called as witness. Thus, all of the judges in the Middle District recused themselves, and a District Judge from the District of Delaware was designated to hear the case.

The Federal Defendants again moved to dismiss the claims asserted against them, and this motion was granted by the new judge on August 17, 1998. Following the dismissal of these defendants, Egervary filed an unopposed motion to have the case transferred back to the Eastern District of Pennsylvania pursuant to 28 U.S.C. § 1404. This motion was granted and a new District Judge was assigned to the case.

Once back in the Eastern District of Pennsylvania, the Attorney Defendants moved for summary judgment. They asserted that there was no violation of Egervary's due process rights and that, even if such a violation had occurred, his Bivens claim against them failed on grounds of waiver, collateral attack, lack of damages, and immunity.

The District Court denied the motion on January 21, 2000, concluding that minimal due process required that Egervary be given either a pre- or post-deprivation hearing. In the order accompanying the January 21 Opinion, the court gave the Attorney Defendants twenty days to submit briefs explaining why the court should not enter summary judgment in favor of Egervary with respect to the issue of liability. In reply, the Attorney Defendants asserted that they were not acting as federal agents and, in the alternative, that their defense of good faith precluded summary judgment.

Relying upon our decision in Jordan v. Fox, Rothschild, O'Brien & Frankel, 20 F.3d 1250 (3d Cir. 1994), the District Court's August 15, 2000, opinion focused on the Attorney Defendants' participation in the execution of the Order. The court concluded that Nallin was not acting as a federal agent because he did not participate in the execution of the Order. However, because Rooney and Burke did participate in the Order's execution, the District Court ruled that there was sufficient evidence for a jury to find that they were acting as agents of the federal government during the commission of the acts which were at the heart of the due process violation suffered by Egervary. The court further held that, pursuant to Jordan, Rooney and Burke could assert a good faith defense to the claims asserted by Egervary. Finally, the court concluded that the issue of good faith presented a jury question so that the issue of liability could not be resolved at the summary judgment stage.

Discovery continued and Rooney and Burke were both deposed, with Rooney's testimony revealing a number of facts not previously known to either Egervary or the court. Specifically, Rooney testified that:

> 1) defendant Young asked Rooney to represent Kovacs and sent him Hungarian government documents regarding the alleged abduction and model ICARA pleadings; 2) while he was preparing the ICARA petition he consulted with the State Department "a bunch of times"; 3) someone from the State Department had called [the] Judge ['s] ... office that morning to inform the Court that a petition was going to be filed; 4) he spoke with Schuler while he was in [the] Judge['s] . . . chambers in order to confirm that the child could be removed from Egervary's custody and returned to Hungary without a hearing; and 5) the State Department arranged for a waiver of the child's passport so that he could be removed immediately from the country.

Based on this new evidence, Egervary moved for leave to amend his complaint to again include the Federal Defendants, asserting that there was no longer any basis for their dismissal from the case. The District Court granted this motion on March 6, 2001.

Egervary filed his amended complaint on March 23, 2001. The Federal Defendants again moved to dismiss and, prior to receiving a ruling on this motion, also moved for summary judgment based on their lack of personal involvement in the actions giving rise to Egervary's claim.

The District Court's September 6, 2001, opinion rejected the Federal Defendants' arguments and denied their motion for summary judgment. A subsequent order issued

on January 17, 2002, denied the Federal Defendants' motions to dismiss and for summary judgment for the reasons stated in the September 6, 2001, Opinion

The District Court then certified the following orders for immediate appeal pursuant to 28 U.S.C. § 1292(b): (1) the January 17, 2002, Order denying the Federal Defendants' motions to dismiss and for summary judgment; (2) the January 21, 2000, Order denying the Attorney Defendants' motions for summary judgment; (3) the August 15, Order granting summary judgment as to Nallin and denying Egervary's motion for summary judgment with respect to the issue of liability; (4) the March 6, 2001, Order granting Egervary leave to file an amended complaint reasserting his claims against the Federal Defendants; and (5) the March 23, 2001, Order denying the Federal Defendants' motion for reconsideration of the March 6, Order.

On January 25, 2002, the Federal Defendants appealed the District Court's January 17, 2002, Order denying their motions to dismiss and for summary judgment with respect to the issue of qualified immunity. Subsequently, on January 28, they filed a petition for permission to present additional issues on appeal pursuant to 28 U.S.C. § 1292(b). Egervary filed a similar petition the same day, and the Attorney Defendants filed a petition for permission to appeal three days later. On March 6, 2002, the Clerk's Office consolidated the three petitions for permission to appeal and submitted them for our review. On April 5, 2002, we granted the petitions and each appeal was then transferred to the General Docket.[3] These three appeals were then consolidated and submitted to us for decision on the merits.

---

[3] Upon being transferred to the General Docket, the Federal Defendants' petition for permission to appeal (C.A. No. 02-8055) became C.A. No. 02-2066, Egervary's petition for permission to appeal (C.A. No. 02-8006) became C.A. No. 02-2035, and the Attorney.

III. Jurisdiction

These consolidated appeals involve a cause of action brought to remedy alleged constitutional violations pursuant to the Supreme Court's decision in Bivens. As such, the District Court exercised subject matter jurisdiction over this case pursuant to 28 U.S.C. § 1331. We have jurisdiction over the Federal Defendants' appeal of the District Court's decision regarding qualified immunity pursuant to 28 U.S.C. § 1291. Our jurisdiction over the remainder of the issues certified for appeal is premised on 28 U.S.C. § 1292(b).

"As the text of § 1292(b) indicates, appellate jurisdiction applies to the order certified to the court of appeals, and is not tied to the particular question formulated by the district court." Pollice v. National Tax Funding, L.P., 225 F.3d 379, 388 (3d Cir. 2000) (citation and internal quotations omitted). Thus, "[w]e may address 'any issue fairly included within the certified order because it is the order that is appealable, and not the controlling question identified by the district court.'" Id. (quoting Abdullah v. American Airlines, Inc., 181 F.3d 363, 366 (3d Cir. 1999)); see also Ivy Club v. Edwards, 943 F.2d270,275(3dCir. 1991). This plainly includes the threshold question of whether Egervary has established a prima facie case under Bivens.

IV. Standard of Review

Where, as here, "we have jurisdiction to review an order rejecting qualified immunity at the summary judgment stage, our review of the order is plenary." Eddy v. Virgin Islands Water & Power Auth., 256 F.3d 204, 208 (3d Cir. 2001). We similarly exercise plenary review over all other issues decided on summary judgment. Chisolm v. McManimon, 275 F.3d 315, 321 (3d Cir. 2001). In so doing, we apply the same test applied by the District Court. Id. Thus, "[s]ummary judgment is appropriate 'if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue

as to any material fact and that the moving party is entitled to judgment as a matter of law.'" Id. (quoting Fed. R. Civ. P. 56(c)).

V. Discussion

Defendants raise a number of defenses to the claims asserted against them, including lack of venue, waiver, absolute immunity, qualified immunity, and good faith. However, we need not reach any of these issues, as we conclude that Egervary, by failing to demonstrate proximate cause with respect to any defendant, has failed to establish an essential element of his claim.[4]

We begin our analysis with the self-evident principle that, because Bivens actions are simply the federal counterpart to § 1983 claims brought against state officials, see Brown v. Philip Morris, Inc., 250 F.3d 789, 800 (3d Cir. 2001), and because tort law causation analysis serves as the basis for determining causation in § 1983 actions, see Hector v. Watt, 235 F.3d 154, 160 (3d Cir. 2001) (citing Hedges v. Musco, 204 F.3d 109,121 (3d Cir. 2000)), tort law causation must govern our analysis of this Bivens claim. Thus, as in any tort case, Egervary must demonstrate that defendants' actions were the proximate cause of the harm he suffered.

Traditionally, in tort law, "proximate cause" has been defined as a person's wrongful conduct which is a substantial factor in bringing about harm to another. See Restatement (Second) of Torts § 431 (1965). However, an intervening act of a third party, which actively operates to produce harm after the first person's wrongful act has been committed, is a superseding cause which prevents the first person from being liable for the harm which his antecedent wrongful act was a substantial factor in bringing about. See Restatement (Second) of Torts§ 440-441 (1965).

---

[4] Because the merits of the underlying custody dispute are not before us, we also need not address the complex residency issues we have discussed in Delvoye v. Lee, 329 F.3d 330 (3d Cir. 2003).

This concept has been recognized in cases such as the one before us. Courts have held that, under certain circumstances, the actions of a judicial officer may sever the chain of causation. For example in Hoffman v. Halden, 268 F.2d 280 (9th Cir. 1959), overruled in part on other grounds, Cohen v. Norris, 300 F.2d 24 (9th Cir. 1962), the plaintiff alleged that the defendants had violated his civil rights by wrongfully committing him to a state mental institution. In examining the proximate cause issue, the court held that it was the order of the court, not the preliminary steps taken to obtain it, that was the proximate cause of the injury:

> In a Civil Rights conspiracy case, the injury and damage must flow from the overt acts. Where the gravamen of the injury complained of is commitment to an institution by court order, this order of the court, right or wrong, is ordinarily the proximate cause of the injury. Various preliminary steps occur before the order is made. These preliminary steps may range from such matters as filing of petitions to the various clerical and procedural activities which lead to the order. In the ordinary case, the order is made after a hearing in court or after consideration by the court of the supporting documents and evidence. Therefore, the various preliminary steps would not cause damage unless they could be said to be the proximate cause of the injury. In the usual case, the order of the court would be the proximate cause and the various preliminary steps would be remote causes of any injury from imprisonment or restraint under the court order.

268 F.2d at 296-97 (emphasis added).

Over time, the law in this area has developed around the general principle that the decision of an independent intermediary "will only constitute an intervening cause if the decision is genuinely free from deception or coercion." Hector, 235 F.3dat 164 (citing cases from the Second, Fifth, Seventh, Eleventh, and D.C. Circuits) (Nygaard, J., concurring).

We had an opportunity to consider this issue, albeit in a somewhat different context, in Hector. There, the plaintiff, following the suppression of evidence seized by Pennsylvania state troopers and the dismissal of charges against him, brought a § 1983 action against the troopers based on their alleged violation of his Fourth Amendment rights. See 235 F.3d at 155. The troopers asserted several defenses to these claims, including the argument that the independent decisions of the prosecutor and grand jury to indict the plaintiff "were superceding or intervening causes that broke the causal connection between the Fourth Amendment violation and Hector's subsequent expenses in mounting a legal defense." Id. at 160.

Although Judge Nygaard would have reached the proximate cause issue in Hector, see id. at 161-65 (Nygaard, J., concurring), the majority found it unnecessary to do so in view of its resolution of the other arguments raised by the defendants, electing instead to leave a more thorough analysis of our stance with respect to the relevant proximate cause question for another day. See id. at 161. Because the threshold inquiry into proximate cause is outcome determinative in this case, we now accept the invitation to delve deeper into this issue. In so doing, we begin, as Judge Nygaard did in Hector, with the Fifth Circuit Court of Appeals' decision in Hand v. Gary, 838 F.2d 1420 (5th Cir. 1988).

Hand involved allegations of malicious prosecution against a deputy sheriff. The Fifth Circuit Court of Appeals, rejecting the plaintiff's claim, held that "'even an officer who acted with malice in procuring the warrant or the indictment will not be liable if the facts supporting the warrant or indictment are put before an impartial intermediary such as a magistrate or grand jury, for that intermediary's 'independent' decision 'breaks the causal chain' and insulates the initiating party.'" Id. at 1427 (quoting Smith v. Gonzales, 670 F.2d522,526 (5th Cir. 1982)). However, as the Ninth Circuit did in Hoffman, the Fifth Circuit in Hand cautioned that, in order for the chain of causation to be broken, the independent intermediary must be presented with all of the facts; "[a]ny misdirection ... by omission or commission perpetuates the taint of the original official behavior." Id. at 1427-28. Applying this ruling to the facts presented in Hector, Judge Nygaard concluded that the chain of causation had been broken and that the officers should not be held liable for damages incurred following the initial detention. See Hector, 235 F.3d at 165 (Nygaard, J., concurring).

Egervary contends, however, that if we rule that the ex parte Order constituted a superseding cause, our decision would run counter to the Supreme Court's decision in Malley v. Briggs, 475 U.S. 335 (1986). Malley was a § 1983 action in which plaintiffs claimed that a state trooper, in applying for warrants to arrest them, had violated their rights under the Fourth and Fourteenth Amendments because the complaint and supporting affidavit failed to establish probable cause. The District Court directed a verdict for the trooper because the act of the judge in issuing the arrest warrants had broken the causal chain between the filing of the complaint and the arrests and because the trooper was entitled to immunity under the "objective reasonableness" standard of Harlow v. Fitzgerald, 457 U.S. 800 (1982). The First Circuit Court of Appeals reversed, holding that an officer who seeks an arrest warrant by

submitting a complaint and affidavit is not entitled to immunity unless the officer has an objectively reasonable basis for believing that the facts alleged in the affidavit are sufficient to establish probable cause. Briggs v. Malley, 748 F.2d 715 (1st Cir.1 1984). The Supreme Court granted certiorari to review the First Circuit's application of the "objective reasonableness" standard in the context of the entitlement to immunity. Malley, 475 U.S. at 339. The causation issue was not included in the grant of certiorari. After determining that a policeman is not entitled to absolute immunity for causing an arrest warrant to be issued, Id. at 341-42, the Court then concluded that qualified immunity, with its "objective reasonableness" standard, was sufficient protection for an officer applying for a warrant. Id. at 343-44. At this point, the Court added a footnote, commenting in dictum that Malley had not pressed the break in the causal chain argument, which the Court found to be "inconsistent with our interpretation of § 1983," adding:

> As we stated in Monroe v. Pape,365U.S. 167, 187... (1961), § 1983 "should be read against the background of tort liability that makes a man responsible for the natural consequences of his actions." Since the common law recognized the causal link between the submission of a complaint and an ensuing arrest, we read § 1983 as recognizing the same causal link.

Id. at 345 fn 7. This comment brings us around full circle to traditional tort concepts of independent, intervening cause. To the extent that the common law recognized the causal link between a complaint and the ensuing arrest, it was in the situation where "misdirection" by omission or commission perpetuated the original wrongful behavior. See, e.g., Hand, 838 F.2d at 1428-29. If, however, there had been an independent exercise of judicial review, that judicial action was a superseding cause that by its intervention

prevented the original actor from being liable for the harm. See Restatement of Torts (Second) § 440 (1965); Hoffman, 268 F.2d at 296-97; Townes v. City of New York, 176 F.3d 138, 147 (2d Cir. 1999). Thus, the cryptic reference to the common law in Malley's footnote 7 would appear to preclude judicial action as a superseding cause only in the situation in which the information, submitted to the judge, was deceptive.

Egervary also cites case law from other circuits to argue that, because each of the defendants allegedly participated in one way or another in making representations to the District Judge prior to the execution of the Order, all of the defendants should be held liable for the subsequent deprivation of his rights.[5] These cited cases, however, are not inconsistent with the conclusion we reach above. The cited cases include Zahrey v. Coffey, 221 F.3d 342, 353-54 (2d Cir. 2000) (holding that the chain of causation was not broken where the prosecutor allegedly fabricated evidence); Warner v. Orange County Dep't of Probation, 115 F.3d 1068, 1072-73 (2d Cir. 1997) (concluding that the neutral, advisory role played by probation officers prevented the chain of causation from being broken where the sentencing judge adopted a recommended sentence which violated a criminal defendant's constitutional rights); Lanier v. Sallas, 777 F.2d 321, 324-25 (5th Cir. 1985) (holding that a judge's decision to commit plaintiff to a mental health facility did not sever the chain of causation where that decision was based in part on a misrepresentation made by defendants).

---

[5] Egervary makes this argument in his Rule 28(j) submission. Federal Rule of Appellate Procedure 28(j) states, in relevant part, that "[i]f pertinent and significant authorities come to a party's attention after the party's brief has been filed – or after oral argument but before decision – a party may promptly advise the circuit clerk by letter, with a copy to all other parties, setting forth the citations." Because Egervary's submission complies with the requirements of this Rule, Rooney and Burke's motion to strike it will be denied.

The purported misrepresentation here, however, is a legal one and not an inadequate or false representation of the factual basis upon which the legal ruling depended. In addition, although Rooney and the other defendants urged the District Judge to conclude that he had the legal authority under ICARA to enter the requested order on an ex parte basis,[6] they also included the three constitutionally valid forms of order in the petition they presented. Moreover, it is axiomatic that, in any given case, the responsibility for determining the governing law and procedures lies with the judge. Indeed, this is a judge's primary responsibility. Thus, the cases cited by Egervary - most of which involve instances in which judicial officers applied the correct law but nevertheless issued unconstitutional orders or warrants as a result of being misled in some

---

[6] We note that the District Judge testified during his deposition that he believes Rooney acted in good faith and did not purposely mislead him:

> [Counsel]: Your Honor, was it your belief that Mr. Rooney was acting in the good faith belief that no hearing was required in this situation to enforce that order?
>
> [Judge]: Yes. I wouldn't expect him to trick me or lie to me, you know, I mean, he's responsible - he made a great impression, he's a responsible person.
>
> [Counsel]: And you believe that he had a good faith belief in what he was telling you?
>
> [Judge]: That would be my conclusion, yes.

Nealon Dep. at 67-68.

way as to the relevant facts[7] - are inapplicable if, as here, the judge fails in the primary judicial duty of identifying the legal principles and procedures which govern the dispute.

The issue presented here of a legally erroneous court ruling is analogous to that faced by the Second Circuit Court of Appeals in Townes. There, the plaintiff filed a § 1983 claim against New York City and several of its police officers after having been convicted of weapons- and drug-related charges on the basis of evidence obtained in violation of the Fourth Amendment. In analyzing the proximate cause issue on appeal, the court concluded that, "as a matter of law, the unconstitutional seizure and search of Townes's person was not a proximate cause of his conviction because of (at least) one critical circumstance: the trial court's refusal to suppress the evidence, which is an intervening and superseding cause of Townes's conviction." 176 F. 3d at 146. Although it was clear to the court that, "but for the defendants' unreasonable seizure and search, Townes's handguns and cocaine would have gone undetected (at least for the time being), and he would not have been convicted of the precise offenses under these precise circumstances," it nevertheless concluded that "the trial court's failure to suppress the evidence concerning Townes's own criminal acts constituted a superseding cause of Townes's conviction and imprisonment." Id. at 147. In so holding, the court reasoned:

---

[7] The one exception to this statement is the Second Circuit's decision in Warner, where the court concluded that, "[g]iven the neutral advisory role of the probation officer toward the court, it [wa]s an entirely natural consequence for a judge to adopt the [Probation Department's] recommendations as to a therapy provider without making an independent investigation of the qualifications and procedures of the recommended provider. Such action by a judge is neither abnormal nor unforeseen." 115 F.3d at 1073 (citations and internal quotations omitted). However, Warner is readily distinguishable on this basis. Although appearing in a partisan capacity clearly does not relieve attorneys of their ethical and professional obligations, judges should "know[] that scrutiny is warranted." Id. at 1072.

> The state trial court, which alone had the power to suppress the improperly *obtained evidence,* had control over the ultimate outcome of Townes's case. That court should have recognized that the defendants violated Townes's clearly established Fourth Amendment rights, and should have suppressed the evidence under the fruit of the poisonous tree doctrine, as the Appellate Division later ruled. The state trial court's exercise of independent judgment in deciding not to suppress the evidence, though later ruled to be erroneous, broke the chain of causation for purposes of § 1983 liability for the plaintiff s conviction and incarceration.

Id. See also Duncan v. Nelson, 466 F.2d 939, 942 (7th Cir. 1972) (affirming the District Court's ruling that a plaintiff may not pursue a cause of action against police officers for unconstitutional conduct in extracting his confession because the trial court's failure to suppress the confession amounted to a superseding cause of the harm they suffered).

Thus, we see that the chain of causation was broken in Townes when the trial court committed an error of law unrelated to the conduct of the defendant police officers. We conclude that the same general principle applies in this case. Simply stated, because minimal due process required providing Egervary with an opportunity to be heard prior to Oscar' s removal from the United States, there is no set of facts under which the Order issued by the District Judge was proper. Indeed, because the judge failed to properly ascertain the relevant law and procedures prior to issuing the Order - a responsibility which was his and his alone - defendants' arguments on the form of order the judge should adopt are insufficient to establish proximate

causation. No statement or omission by defendants could possibly have made the issuance of such an order appropriate. Rather, the judge's execution of an order permitting Oscar's removal from the United States without either a pre- or post-deprivation hearing amounted to an error of law for which the judge alone was responsible.

To sum up, we adhere to the well-settled principle that, in situations in which a judicial officer or other independent intermediary applies the correct governing law and procedures but reaches an erroneous conclusion because he or she is misled in some manner as to the relevant facts, the causal chain is not broken and liability may be imposed upon those involved in making the misrepresentations or omissions. See, e.g., Hand, 838 F.2d at 1427-28; Hector, 235 F.3d at 164 (citing cases) (Nygaard, J., concurring). However, we draw a distinction between that situation and the facts as presented both here and in Townes, where the actions of the defendants, while clearly a cause of the plaintiff's harm, do not create liability because of the intervention of independent judicial review, a superseding cause. We conclude that where, as here, the judicial officer is provided with the appropriate facts to adjudicate the proceeding but fails to properly apply the governing law and procedures, such error must be held to be a superseding cause, breaking the chain of causation for purposes of § 1983 and Bivens liability. Cf. Sheppard v. E.W. Scripps Co., 421 F.2d 555, 558 (6th Cir. 1970) (concluding that any deprivation of a criminal defendant's rights in a high profile murder case was a result of the manner in which the judge conducted the trial, thus breaking the chain of causation); Whittington v. Johnston, 201 F.2d 810, 811-12 (5th Cir. 1953) (holding that attorney-defendant's role in instituting commitment proceedings was not the proximate cause of the due process violation suffered by the plaintiff where the presiding judge elected not to provide the plaintiff with notice and an opportunity to be heard).

Moreover, we reject Egervary's argument that our decision in Jordan requires that liability be imposed on defendants for their alleged participation in the execution of the Order after it had been entered by the District Judge. Jordan involved the execution of a confessed judgment by private attorneys, without a pre-deprivation hearing. See Jordan, 20 F.3dat 1264-67. In the case before us, to the contrary, the defendants obtained an order from an independent judicial officer. Jordan is clearly distinguishable. Here, as Egervary conceded at oral argument, none of the post-hearing actions taken by defendants violated the terms of the District Judge's Order and none would have been possible without the issuance thereof. Thus, because the judge's execution of the ex parte Order superseded any prior tortious conduct by defendants and shrouded any subsequent actions with a cloak of legitimacy, we find no basis for imposing Bivens liability on any of the defendants.

This is not to say that we condone behavior in which an attorney urges the court to make an erroneous decision or fails to properly investigate the facts or governing law before presenting them to the court. However, such actions or omissions would neither excuse judges from their responsibility to correctly ascertain the relevant law and procedures nor would they create civil liability on the part of others for errors of law committed by judges.

Finally, we note that neither the District Judge's error in granting the Order nor the defendants' actions in seeking and executing it left Egervary without a remedy in the underlying case. Egervary initially filed a motion for reconsideration of the ex parte Order. He could have pursued this motion, and, if it were denied, appealed the ruling. A reversal by this Court then would have permitted Egervary to enlist the aid of the State Department in obtaining Oscar's return. He instead chose to withdraw his

motion for reconsideration and pursue the Bivens claim. While it was clearly his right to do so, he is now left with the consequences of that decision.

VI. Conclusion

For the reasons stated above, we will reverse the District Court's denial of summary judgment to Rooney, Burke, Young, and Schuler, and remand this case to the District Court with directions to enter summary judgment in their favor. The District Court's grant of summary judgment to Nallin will be affirmed on the alternative grounds discussed above. Rooney and Burke's motion to strike Egervary's Rule 28(j) submission will be denied.

PRECEDENTIAL

UNITED STATES COURT OF
APPEALS FOR THE THIRD CIRCUIT

Nos: 02-1284/2035/2066/2133

OSCAR W. EGERVARY
v.
VIRGINIA YOUNG; JAMES SCHULER; FREDERICK P. ROONEY, ESQUIRE; JAMES J. BURKE, ESQUIRE; JEFFREY C. NALLIN, ESQUIRE; JOHN DOES ONE-TEN

Virginia Young, James Schuler,
Appellants in No. 02-1284 & 02-2066

OSCAR W. EGERVARY,
Appellant in No. 02-2035
v.
VIRGINIA YOUNG; JAMES SCHULER; FREDERICK P. ROONEY, ESQUIRE; JAMES J. BURKE, ESQUIRE; JEFFREY C. NALLIN, ESQUIRE; JOHN DOES ONE-TEN

OSCAR W. EGERVARY

v.

VIRGINIA YOUNG; JAMES SCHULER; FREDERICK P. ROONEY, ESQUIRE; JAMES J. BURKE, ESQUIRE; JEFFREY C. NALLIN, ESQUIRE; JOHN DOES ONE-TEN

Frederick P. Rooney, Esquire, James J. Burke, Esquire,
Appellants in No. 02-2133

Appeal from the United States District Court
for the Eastern District of Pennsylvania
(D.C. Civil Action Nos.96-cv-03039)
District Judge: Honorable Thomas N. O'Neill, Jr.,

Argued on January 16, 2003

Before: ROTH, FUENTES and ALDISERT, Circuit Judges

JUDGMENT
[Entered April 30, 2004]

This case came on to be heard on the record before the United States District Court for the Eastern District of Pennsylvania and was argued on January 16, 2003;

On consideration whereof,

IT IS ORDERED AND ADJUDGED by this Court that he judgment of the District Court dated April 5, 2002, is hereby reversed to the District Court's denial of summary judgment to Rooney, Burke, Young, and Schuler, and remand this case to the District Court with directions to enter summary judgment in their favor. **Costs are taxed against the appellees.**

All of the above is in accordance with the opinion of this Court.

ATTEST:

/s/ _____

Clerk

Dated: April 30, 2004

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

OSCAR W. EGERVARY	:	
	:	
v.	:	**CIVIL ACTION**
	:	**No. 96-3039**
VIRGINIA YOUNG, et al.	:	

ORDER
[Entered January 17, 2002]

In the Memorandum of September 6, 2001, I stated that I intended to certify various Orders in this action for immediate appeal pursuant to 28 U.S.C. § 1292(b). I have delayed the certification at the request of the United States Attorney, to which counsel for plaintiff did not object, so that the United States Attorney could secure permission to take an appeal from the Solicitor General of the United States. I have now been informed that the Solicitor General has authorized the United States Attorney to take an appeal in this action.

AND NOW, this 17th day of January, 2002, upon consideration of the federal defendants' motion to dismiss the plaintiff's claims, the federal defendants' motion for summary judgment, and the plaintiff's responses thereto, it is herby ORDERED that the motions are DENIED for the reasons stated in the memorandum Opinion of September 6, 2001.

It is further ORDERED, for the reasons stated in the Memorandum Opinion of September 6, 2001, that the following Orders in this case are certified for immediate appeal pursuant to 28 U.S.C. § 1292(b) because they involve controlling questions of law as to which there is substantial

ground for differences of opinion and immediate appeal from them may materially advance the ultimate termination of the litigation:

(1) the instant Order;

(2) the January 21, 2000 Order denying the attorney defendants' motions for summary judgment;

(3) the August 15, 2000 Order granting summary judgment to defendant Jeffrey C. Nallin, Esquire and denying summary judgment as to liability in favor of the plaintiff;

(4) the March 6, 2001 Order granting the plaintiff leave to amend the complaint to reassert claims against the federal defendants; and

(5) the March 23, 2001 Order denying the federal defendants' motion for reconsideration.

/s/Thomas N. O'Neill, Jr., J.
THOMAS N. O'NEILL, JR., J.

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

OSCAR W. EGERVARY	:	
	:	
v.	:	**CIVIL ACTION**
	:	**No. 96-3039**
VIRGINIA YOUNG, et al.	:	

ORDER
[Entered September 13, 2001]

AND NOW, this 13th day of September, 2001:

1. The Memorandum dated January 21, 2000, is amended to read as follows: (page 16, line 20) "Mr. Egervary had tenable, though not necessarily dispositive, arguments..."

2. The Memorandum dated September 6, 2001, is amended to read as follows: (footnote 27 on page 49, fifth line) "Mr. Egervary had tenable, though not necessarily dispositive, arguments..."

/s/ Thomas N. O'Neill, Jr., J.
THOMAS N. O'NEILL, JR., J.

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

OSCAR W. EGERVARY	:	
	:	
v.	:	**CIVIL ACTION**
	:	**No. 96-3039**
VIRGINIA YOUNG, et al.	:	

O'Neill, J. **September 6, 2001**

MEMORANDUM
[Entered September 6, 2001]

TABLE OF CONTENTS

I. INTRODUCTION 2

II. BACKGROUND 3

A. Oscar's Alleged Abduction and Return to Hungary 3

B. The Hague Convention/ICARA Proceedings 5

1. The Law 5

2. The Proceedings 9

C. The History of This Action 20

III. DISCUSSION 24

A. Venue 24

1. The Law of the Case Doctrine 25

2. A Substantial Part of the Events Giving Rise to the Claim 26

B. Service of Process 29

1. Rule 4 and Pa. R. Civ. P. 403 29

2. 22 C.F.R. § 172.2 32

C. Statute of Limitations 34

1. Rule 54(b) 35

2. Rule 15(c) and the Relation Back Doctrine 37

3. Equitable Estoppel 40

D. Qualified Immunity 43

1. Due Process Violation 44

a. Liberty Interest 45

b. The Constitutional Sufficiency of the Process 47

2. Clearly Established Right 50

a. Federal Law as of May 1994 51

b. Violations of ICARA, State Law, and Federal Regulations 55

3. The Federal Defendants' Reply Arguments 60

E. Personal Involvement 64

1. The Summary Judgment Standard 64

2. The Legal Standard for Personal Involvement in a Constitutional Tort 66

3. Evidence of Personal Involvement 68

a. The Retention of and Assistance to Rooney and the Model Pleadings 68

b. The Phone Call to Judge Nealon's Chambers 71

c. The Federal Defendants' Ignorance of the "Fourth Option" 75

d. The Federal Defendants' Ignorance of the Ex Parte Nature of the Meeting with Judge Nealon 77

e. The Phone Calls after the Meeting with Judge Nealon 82

f. The Passport Waiver 83

g. Schuler's Follow-Up Letter 85

IV. CONCLUSION 87

I. INTRODUCTION

This case is a Bivens action alleging the violation of plaintiff s due process rights during an international child custody dispute and has been the subject of four prior memorandum opinions. See Egervary v. Young, No. 96-3039, 1997 WL 9787 (E.D. Pa. Jan. 7, 1997) (Troutman, J.) ("Egervary I): Egervary v. Rooney, 80 F. Supp. 2d 491 (E.D. Pa. 2000) (O'Neill, J.) ("Egervary II"): Egervary v. Rooney, No. 96-3039, 2000 WL 1160720 (E.D. Pa. Aug. 15, 2000) (O'Neill, J.) ("Egervary III"): and Egervary v. Young, _ F. Supp. 2d _, No. 96-3039, 2001 WL 569259 (E.D. Pa. May 22, 2001) (O'Neill, J.) ("Egervary IV"). Presently before me are: 1) the federal defendants' motion to dismiss the amended complaint for improper venue pursuant to Rule 12(b)(3); 2) the federal defendants' motion to dismiss the amended complaint for insufficient service of process pursuant to Rule 12(b)(5); 3) the federal defendants' motion to dismiss

the amended complaint for failure to state a claim pursuant to Rule 12(b)(6) on two grounds, statute of limitations and qualified immunity; and 4) the federal defendants' motion for summary judgment pursuant to Rule 56 on the grounds that they had no personal involvement in the alleged constitutional tort. For the reasons stated below, the motions will be DENIED.

II. BACKGROUND

A. Oscar's Alleged Abduction and Return to Hungary

Plaintiff Egervary was born in 1955 in Hungary, where he suffered political oppression at the hands of the then-communist government because his father was a church official.[1] See Egervary Aff. (June 9, 1994) ¶¶1-2. In 1980, he emigrated to the United States as a political refugee. Id. He became a U.S. citizen in 1987. Id. ¶3.

In 1990, Egervary became romantically involved with Aniko Kovacs, a Hungarian national who came to the U.S. to study music. Id. ¶4. They briefly returned to Hungary in 1991 to be wed by Egervary's father. Id. Thereafter, they established their marital residence in Hackensack, New Jersey. Id.¶5. Their son, Oscar Jonathan Egervary, was born on Independence Day, July 4, 1992. Id.¶6.

In February 1993, Kovacs, a concert violinist, traveled to Hungary with Oscar to perform in a concert to be held in Budapest that March. Id.¶7. They were scheduled to return to the U.S. on April 6, 1993, and Egervary had purchased a ticket to fly to Hungary and escort them back. See Egervary Aff. (July 7, 1994) ¶2. A few days before, however, Kovacs called Egervary and said she needed to

---

[1] The father, Oscar Egervary, will be referred to as "Egervary" or "plaintiff." The son, Oscar Jonathan Egervary, will be referred to as "Oscar."

stay until the beginning of May to perform in another concert. Id. Shortly before she and Oscar were to return in May, Kovacs again called Egervary and said that she would be staying in Hungary because she had an opportunity to take a teaching position in Budapest until the end of the year. Id. Shortly thereafter, she separated from Egervary and informed him that she would not return to the U.S. and would not return Oscar to this country. Id.

In June and July of that year, Egervary traveled to Hungary in an attempt to reconcile with his wife and bring Oscar home. Id. In July, Kovacs returned to the U.S. with Egervary for a short time, but she insisted on leaving Oscar in Hungary with her parents. Id.

In August, Egervary returned to Hungary and stayed for three months in another attempt to reconcile with his wife. Id. During that stay, he took a job teaching English in order to support himself. Id. He stayed there from approximately August to November of 1993. Id. He brought some personal belongings from the U.S., but he did not plan on establishing residence there and did not register with the Hungarian government as a resident. Id.

In September, Kovacs took Oscar to an undisclosed location in Hungary in an apparent attempt to hide the child from his father. See Egervary Aff. (June 9, 1994) ¶8. At that time, she left Egervary a letter that, in part, stated: "I'd like to notify you in this farewell letter that I've moved out from you, together with Ossika [i.e., Oscar] ... I moved to a location unknown to others deliberately and I didn't move to my parents on purpose." See Egervary Aff. (July 7, 1994) ¶3. Egervary searched for his son for approximately three months. Id. During that time, he consulted with the American Embassy in Budapest and was told that if he could find Oscar he was free to take the child back to the U.S. Id.

On December 18, 1993, Egervary found Kovacs and Oscar leaving her parents' apartment house in Budapest. Id. According to Egervary, Oscar's clothing was "dirty and ragged" and the boy appeared undernourished. See Egervary Aff. (June 9, 1994) ¶9. Egervary took Oscar from Kovacs and left Hungary with him the next day. Id. Upon their return to the U.S., Egervary set up residence with his son in Monroe County, Pennsylvania. Id.

On May 13, 1994, members of the Pennsylvania State Police and U.S. Marshals arrived at Egervary's home with an order signed by the Honorable William J. Nealon of the United States District Court for the Middle District of Pennsylvania. Id. ¶10. Pursuant to the order, Oscar was removed from Egervary's custody and delivered to defendant Frederick P. Rooney, Esq. Id. Rooney then took Oscar to the airport, flew him to Europe, and returned the child to his mother. See Rooney Dep. at 169. All parties concede that Egervary was given no notice of or opportunity to be heard in the ex parte Hague Convention/ICARA proceedings that led to the order.

B. The Hague Convention/ICARA Proceedings

1. The Law

The Hague Convention on the Civil Aspects of International Child Abduction is a multilateral international treaty on parental kidnaping adopted by the United States and other nations in 1980. The goal of the Convention is to "protect children internationally from the harmful effects of their wrongful removal or retention and to establish procedures to ensure their prompt return to the State of their habitual residence." See Hague Convention, Preamble. The Convention reflects "a universal concern about the harm done to children by parental kidnaping and a strong desire among the Contracting States to implement an effective deterrent to such behavior." Feder v. Evans-Feder,

63 F.3d 217, 221 (3d Cir. 1995). The Convention is "designed to restore the 'factual' status quo which is unilaterally altered when a parent abducts a child." Id.

The United States has implemented the Hague Convention by enactment of the International Child Abduction Remedies Act ("ICARA"), 42 U.S.C. § 11601 et seq. ICARA vests state and district courts with concurrent jurisdiction over claims arising under the Convention and empowers those courts to order the return of kidnapped children. See 42 U.S.C. § 11603. An ICARA hearing is not a custody hearing. See Blondin v. Dubois, 189 F.3d 243. 245 (2d Cir. 1999) (under ICARA, a district court has "the authority to determine the merits of an abduction claim, but not the merits of the underlying custody claim"), quoting Friedrich v. Friedrich, 983 F.2d 1396, 1400 (6th Cir. 1993); Hague Convention, Article 19 ("A decision under this Convention concerning the return of the child shall not be taken to be a determination on the merits of any custody issue."). An ICARA proceeding merely determines which nation should hear the underlying custody claim. See Blondin, 189 F.3d at 246.

An ICARA petitioner bears the burden of proving by a preponderance of the evidence that the child in question has been wrongfully removed from the nation of his or her "habitual residence" immediately before the removal. See 42 U.S.C. § 11603(e)(l)(A); Hague Convention, Articles 3 and 4.[2] If the petitioner establishes that the removal was wrongful, the child must be returned unless the respondent can establish one or more of four defenses: 1) the ICARA proceedings were not commenced within one year of the child's abduction; 2) the petitioner was not actually exercising custody rights at the time of the removal; 3) there is a grave risk that return would expose the child to

---

2 The Hague Convention and ICARA also apply if a child has been wrongfully retained outside of the nation of his or her "habitual residence." Id.

"physical or psychological harm or otherwise place the child in an intolerable situation"; or 4) return of the child "would not be permitted by the fundamental principles . . . relating to the protection of human rights and fundamental freedoms." Id.; Hague Convention, Articles 12, 13 and 20. The first two defenses can be established by a preponderance of the evidence; the last two must be established by clear and convincing evidence. Id.; 42 U.S.C. § 11603(e)(2).

ICARA also provides that notice "be given in accordance with the applicable law governing notice in interstate child custody proceedings." See 42 U.S.C. § 11603(c). Courts interpreting this provision have found the "applicable law" to be the Parental Kidnaping Prevention Act, 28 U.S.C. § 1738A ("PKPA"), and the Uniform Child Custody Jurisdiction Act, 23 Pa.C.S.A. § 5341, et seq. ("UCCJA"). See Brooke v. Willis, 907 F. Supp. 57, 60 (S.D.N.Y. 1995); Klam v. Klam, 797 F. Supp. 202, 205 (E.D.N.Y. 1992). Both PKPA and UCCJA provide for "reasonable notice and opportunity to be heard." See 28 U.S.C. § 1738A(e); 23 Pa.C.S.A. § 5345. This generally means "a plenary hearing at which both sides are heard." Klam, 797 F. Supp. at 205. However, because there is an inherent risk of flight during the pendency of a petition, courts "may take or cause to be taken measures under Federal or State law, as appropriate, to protect the well-being of the child involved or to prevent the child's further removal or concealment before the final disposition of the petition." See 42 U.S.C. § 11604(a).

The Convention also provides that "a Contracting State shall designate a Central Authority to discharge the duties which are imposed by the Convention upon such authorities." See Hague Convention, Article 6. The Bureau of Consular Affairs of the U.S. Department of State has been designated the Central Authority for the United States. See 22 C.F.R. § 94.2. The Convention describes the duties of such Central Authorities:

Central Authorities shall cooperate with each other and promote co-operation amongst the competent authorities in their respective States to secure the prompt return of children and to achieve the other objects of this Convention.

In particular, either directly or through any intermediary, they shall take all appropriate measures

(a) to discover the whereabouts of a child who has been wrongfully removed or retained;

(b) to prevent further harm to the child or prejudice to interested parties by taking or causing to be taken provisional measures;

(c) to secure the voluntary return of the child or to bring about an amicable resolution of the issues;

(d) to exchange, where desirable, information relating to the social background of the child;

(e) to provide information of a general character as to the law of their State in connection with the application of the Convention;

(f) to initiate or facilitate the institute of judicial or administrative proceedings with a view to ~~obtain~~ing the return of the child and, in a proper case, to make arrangements for organizing or securing the effective exercise of rights of access;

(g) where the circumstances so require, to provide or facilitate the provision of legal aid and advice, including the participation of legal counsel and advisors;

(h) to provide such administrative arrangements as may be necessary and appropriate to secure the safe return of the child;

(i) to keep each other informed with respect to the operation of this Convention and, as far as possible, to eliminate any obstacles to its application.

See Hague Convention, Article 7. See also 22 C.F.R. § 94.6.

State Department regulations implementing the Convention further clarify these duties. The regulations provide that State Department officials are "prohibited from acting as an agent or attorney or in any fiduciary capacity in legal proceedings arising under the Convention." See 22 C.F.R. § 94.4(a). They may, however, "[a]ssist applicants in securing information useful for choosing or obtaining legal representation, for example, by providing a directory of

lawyer referral services, or pro bono listing published by legal professional organizations, or the name and address of the state attorney general or prosecuting attorney who has expressed a willingness to represent parents in this type of case and who is employed under state law to intervene on the applicant's behalf." See 22 C.F.R. § 94.6(d).

2. The Proceedings

Sometime prior to Oscar's removal from the United States on May 13, 1994, Kovacs had sought and received the State Department's help in retrieving her son, who, she claimed, had been kidnaped from Hungary by his father. On May 10th or 11th,[3] defendant Virginia Young of the Bureau of Consular Affairs had contacted defendant Rooney and asked him to represent Kovacs in filing an ICARA petition. See Rooney Dep. at 55-56. In what appears to be a follow-up letter to a phone conversation earlier that day, Young wrote:

> Dear Mr. Rooney,
>
> The case I hope you will be able to accept is that of an almost-two-year-old child, Oscar Egervary, who, according to the information we have, was quite brutally kidnapped by his father and brought to the U.S. The mother, your client-to-be, is a violin soloist in Budapest and the father in the U.S. is unemployed, so I'm sorry but it doesn't look like there's any money anywhere.
>
> The child was born in the U.S. but the family apparently decided to go back home, and apparently the father gave up job [sic] and

---

[3] It is unclear whether Young's first contact with Rooney occurred on May 10th or May 11th. In his deposition, Rooney stated that it was May 11th. See Rooney Dep. at 56. Young's follow-up letter to that conversation, however, is dated May 10th. See Young Ltr. (May 10, 1994).

> belongings to relocate. And then seems to have changed his mind. I figure the Hague applies in that the child lived a month or two longer in Hungary than he did in the U.S. and the information seems to indicate that Hungary had been established as the place of residence when the father did the kidnapping . . .
>
> I hope you can help. Thanks for your consideration of this case.

See Young Ltr. (May 10, 1994).[4]

Rooney accepted the case, and immediately began receiving assistance from Young. See Rooney Dep. at 62. He had never handled a Hague Convention case in the United States. See Rooney Dep. at 23-25, 30, 61-62.[5] He therefore needed assistance "in trying to figure out how to best file the order." Id. at 62. He "had to rely on them to help [him] through it" because he "was not extremely well-versed on The Hague."

Some of this assistance consisted of written materials. On the day he took the case, Young faxed Rooney Hungarian government documents regarding Egervary's

---

[4] I note that Egervary's sworn testimony, the only testimony in this case on these points, refutes most of the factual claims Young makes in this letter. Egervary denied that there was any "brutality" on December 18, 1993 when he retrieved Oscar. See Egervary Dep. at 53. He also denied that he intended at any time to relocate to Hungary. See Egervary Aff. (July 7, 1994) ¶ 2.

In addition, the claim that Oscar had "lived a month or two longer in Hungary than he did in the U.S." ignores Egervary's contention that Kovacs began illegally retaining Oscar in Hungary as of May 1993 and hid the child from his father as of September 1993. Id. ¶ 2; Egervary Aff. (June 9, 1994) ¶ 8.

[5] Rooney may have handled one Hague Convention case prior to the Egervary matter, but that case took place in the Danish courts. Id. at 23-25.

alleged abduction of his son and Kovacs' subsequent Hague Convention petition to the Hungarian government. Id. She also sent him model ICARA pleadings that had been published by the ABA. Id. at 63-64. Those model pleadings contained three different options for effecting the return of the child. See Federal Defendants' Br. (July 9, 2001) at Exhibit G ("Model Petition") and Exhibit H ("Model Warrant"). All three of those options suggested an initial ex parte proceeding without notice to the alleged parent-kidnapper, followed by seizure of the child and a prompt postdeprivation hearing with notice. Id. See also infra Part III-E-3-a.

The federal defendants' assistance to Rooney was not, however, limited to transmission of those written documents. Between May 10th and May 13th, Rooney spoke to Young, and possibly also to defendant James Schuler, "a bunch of times." See Rooney Dep. at 62, 74. There were "a bunch of phone calls" about "where the child was" and "how to get an order together." Id. at 62-63. As defendant James Burke, Rooney's associate, later described it, "they seemed to be calling constantly ... I remember the phone calls was [sic] constantly coming in and it was the State Department. . . they were calling all the time it seemed like." See Burke Dep. at 26-27'. During this period, Rooney never spoke with Kovacs or any member of her family. See Rooney Dep. at 86-89.

On May 13, 1994, Rooney, Burke, and local counsel Jeffrey Nallin filed an ICARA petition in the Middle District.[6] The petition was similar to the model pleadings that Young had sent Rooney earlier that week, but there was one difference. In addition to the three options that provided for seizure of the child without notice followed a postdeprivation hearing with notice, Rooney included a

---

[6] Nallin was named as a defendant, but summary judgment was entered in his favor in Egervary III, 2000 WL 1160720, at *6.

fourth option that eliminated the postdeprivation hearing. Specifically, the fourth option directed "any peace officer within the Commonwealth of Pennsylvania" to "take into protective custody Oscar Jonathan Egervary and deliver him to Petitioner's agent [i.e., Rooney] for immediate return to the physical custody of Petitioner [i.e., Kovacs]." See Federal Defendants' Br. (July 9, 2001) at Exhibit F.

After filing the petition, Rooney met with Judge Nealon, to whom the petition had been assigned. According to Rooney, when he arrived in Judge Nealon's chambers someone from the State Department had already called to inform the Court that a Hague Convention petition was going to be presented that day:

> Q: In your Answers to Interrogatories I believe you said, and I don't have them in front of me but I will get them if there's a question about this, I believe that you said that the State Department had contacted the court to arrange for you to appear before Judge Nealon.
>
> A: I don't know if they called to arrange. They called to inform the court that a petition would be presented involving a Hague matter. I don't know who called, I don't know with whom they spoke; I just knew that by the time we got there the judge was aware or the judge's chambers was aware of someone coming in with a petition. I also think that we may have called, someone from my office may have called, to advise the judge that we were on our way to Scranton.

> Q: What made you think that someone from the State Department had contacted chambers?
>
> A: I may have recalled the secretary saying, Oh, yes, we got a call from the State Department saying that a petition was going to be brought in.

See Rooney Dep. at 120-21. See also Rooney Interrogatories (July 17, 1998) at 7(c); Rooney Amended Answers (undated) at 7(c).

During the meeting, Rooney argued that Judge Nealon should order the fourth option, i.e., the immediate return of the child to his mother in Hungary. Judge Nealon, however, doubted whether such an order would be lawful:

> Q: ... What reservations did the judge express?
>
> A: I think he questioned whether or not he had the authority to order the return of the child, and I said all I could tell him is that in my experience in foreign jurisdictions, and I mean domestic foreign, not Pennsylvania, that under the UCCJA that with a certified copy of a court order that you could go from Pennsylvania to retrieve children in California with a certified Pennsylvania court order without having to invoke the whole process of hearings in California.

Id. at 125-26.

Because of these reservations, Rooney called the State Department and spoke to Schuler to confirm that Judge Nealon had the authority to order the immediate return of the child:

> Q: Did you speak to him [i.e., Schuler] about it [i.e., the relief requested] before it was presented to the court or after?
>
> A: In between.
>
> Q: Meaning what?
>
> A: I went in and I saw Judge Nealon. I spoke to him about the situation, presented him with the petitions and the order, and to the best of my recollection he then had a status conference or had to do something, and so he adjourned our meeting. I waited and during that period of time I spoke to Jim Schuler because the judge was specifically concerned about whether or not he had the authority to allow the child to be returned. While it was my impression that he did, in order to assure the judge that, in fact, my interpretation of his authority was correct, I called Schuler from the Judge's chambers and I said, Jim, Judge Nealon appears to be willing to sign an order for the child to be returned, but he wants to just be sure that that's within his authority and Schuler said to me he's the judge. He's got the authority to make whatever decision he wants.

Q: Tell me, as best you remember, what was said during that telephone conversation.

A: That I was in the judge's chambers and that he had a petition and one of the options was the return of the child to Hungary, and that he had some concern about whether or not that was in his discretion. I said to you before, his answer was he's the judge. Basically this is not verbatim, but he's the judge. He can do whatever he feels is appropriate.

Q: Did you, during that conversation, advise Mr. Schuler that no notice of this, the filing of this petition, had been given to Mr. Egervary?

A: No, but I think that we would have assumed that that was the case simply because in most Hague matters notice is not given to someone who has been determined to be an abducting parent for fear that upon notice of something pending that there would be a flight with a child. It would have been highly irregular to give notice to a parent in this situation for fear that the child would then be taken someplace else.

Id. at 115-16, 131-32.

Rooney also states that after his conversation with Schuler he discussed other options with Judge Nealon:

Q: And what was discussed during that second meeting in chambers with the judge?

A: We talked about alternatives that he had under the order that I had presented, and that in instances children are taken into protective custody and that the child could have been held by social services in Monroe County. I don't remember what else could have been done right now, but that he could have gone into a juvenile shelter, that he could have been taken into protective custody.

Q: And you described those alternatives to the judge?

A: Correct.

Q: And then what was said?

A: Well, I remember the judge mentioning, it was Friday and it may have been difficult to get protective services in at that time, given the time of day or the fact that it was a Friday. That I remember. And I told him that I didn't know anyone else in the area. I didn't know if there was any other family members with whom the child could be left, and that given those circumstances, whatever his decision was I would abide by it and respect it, but I told him if the child, if he ordered the return of the child, that I would take the child to Hungary.

Id. at 133-34.

Judge Nealon's testimony agrees with much of Rooney's testimony, but it differs on a few key points.[7] According to Judge Nealon, Rooney: 1) portrayed himself as representing the State Department; 2) stated that he was seeking to have the Judge enforce a Hungarian court order; 3) had already made arrangements to return the child to Hungary that day; and 4) never suggested any remedy that would require Judge Nealon to conduct a hearing on the matter:

> Q: What did Mr. Rooney tell you about them [i.e., the papers that had been filed in support of the petition]?
>
> A: Well, capsulizing what he told me and I have to use this word advisedly whether he said he was retained, I thought he said he was retained, at least that's the impression I got, by the State Department to present this petition that there had been a proceeding in Hungary where a - at which the father was represented. And the court awarded custody to the mother and that the father went over to Hungary, kidnaped the youngster and took the youngster back and was now located in Cresco in Monroe County. And what he was seeking to do was enforce the Hungarian Court

---

[7] In Egervary IV, I denied the federal defendants' motion for a protective order to stop Judge Nealon's deposition from going forward while the motion to dismiss on the basis of qualified immunity was pending. In so doing, I "questioned] whether I have the power to compel Judge Nealon to testify about events that occurred in his chambers during official proceedings." See Egervary IV, 2001 WL 569259, at *4. I noted, however, that I did not have to resolve that question because Judge Nealon had agreed to give his deposition. Id. at *6. See also Egervary II, 491 F. Supp. 2d at 495-96 n.3.

judgment by signing the warrant and picking up the child. And once again, and you people can flush it out later, it was indicated to me that this was the appropriate remedy and that the arrangements had been made to take the child and return, I think, that day to Hungary. It was a very critical period, according to him, that something had to be done promptly.

Q: Was that because arrangements had already been made to take the child back?

A: Well, that had been represented that the arrangements had been made. Now, the extent of them I don't know. Whether he said he had an airplane ticket or could get an airplane ticket or something along that line I don't know. But it was really an emergency matter according to him.

A: And let me - I know the petition mentions hearings, but at no time did he suggest a hearing to me. I want to be empathic about that. That this - that while hearings may have been required in a normal kidnaping context, here was a court order out of Hungary and that he had been retained by the State Department to implement this and pick up this child and have her returned to Hungary. It was an interpretation of international law. And I remember being concerned about it and saying that I want to find

out if this is the official State Department position. I don't have experience in these matters and I'm willing to take their representation if they say that no hearing is required, no notice is required, and that the child should be immediately picked up and turned over to Mr. Rooney for prompt return to Hungary.

Q: When you said that to Mr. Rooney what did he do?

A: He made a phone call and came back and said, yes, they said that is the remedy they're seeking and that is the appropriate remedy.

Q: During that meeting did Mr. Rooney show you a copy of the language of the Hague Convention on international child abduction to support that position?

A: I can't say that he did, but once again in a sophisticated legal area where - with which I have little familiarity I was prepared to rely upon the representation of the Department of State of the United States of America was telling me as a Judge that this was the remedy that was being sought. See, and I know there's dispute about the hearing, but the easiest thing in the world for me to do would be to order a hearing. I mean, if he came in and said one of your options is a hearing, I would have

> ordered that immediately. That would be the appropriate thing to do. I had to be talked out of it. And I was talked out of it by saying this is what the State Department says that that - the appropriate remedy and the remedy they're seeking is the immediate taking custody of the youngster and taking him right back to his mother in recognition of a valid order from Hungary. I can't conceive of why I would ask him to call the State Department if I was going to set a hearing. Why would I need to ask the State Department about a hearing? The only reason I wanted to call the State - to have the State Department called was he was telling me there was no need for notice and no need for a hearing. And the word came back that this was correct that is what they were seeking and that was the appropriate thing for me to do.

See Nealon Dep. at 16-20, 22-24.

Judge Nealon also repeatedly emphasized that he ordered the immediate return of the child because he was relying upon what he perceived to be the State Department's representation that that remedy was appropriate:

> Q: Now, among the other choices available on this second page are choices which would enable the child to be taken into protective custody immediately and then released to either a juvenile shelter or to the

mother or her agent and kept in this district pending a hearing. Did you discuss those options with Mr. Rooney or did Mr. Rooney suggest those as viable alternatives?

A: No. He did not suggest them. He did not suggest them. The only request he was making, as I said, was for the immediate action by the law enforcement officer to take the child into custody. See a hearing would have been the easiest thing in the world for me to do. If he had said you can hold a hearing, I'd say fine, let's set it down. About custody, I'd be willing to turn custody over to him. That would be no problem. I wouldn't be the least bit interested in what the State Department had to say at that point. There would be no need for me to make an emergency phone call. The State Department could make their arg[illegible]'s at the hearing, so I - they were never presented to me as alternatives . . . And as I say - maybe it's too much trust, but you're inclined to rely on the expertise of a federal department that purportedly has expertise in that area. But I did have qualms about it. I mean, I just didn't sit down and sign it. I said I want you to get an assurance that this is the appropriate thing to do.

Q: And is it accurate to say that the reason that you wouldn't rely on that is because it would be important to

know what the person from the State Department knew about the case, what he had been told about the case and what he had actually said about the case?

A: Absolutely. If it weren't for the involvement of the State Department I would not have taken the action I did take.

Id. at 26-28, 139-40.

After Judge Nealon signed the order, Rooney and Burke went to the U.S. Marshal's office to get the Marshal's assistance in executing the order. See Rooney Dep. at 157. While waiting in the Marshal's office, Rooney called the State Department to update them on what was happening. See Burke Dep. at 70-71. Rooney and Burke then accompanied the Marshals to Egervary's home. See Rooney Dep. at 157. The attorneys remained parked on the public road outside of Egervary's residence while the Marshals retrieved the child. Id. at 158-59. The Marshals brought the child to Rooney and Burke, who immediately drove the child to Newark International Airport. Id. at 160. On the way to the airport, Rooney again called the State Department to give them an update. See Burke Dep. at 70-71. In fact, as Burke later testified, Rooney was "continuously in conversation" with the State Department throughout that day. Id. at 71.

While they drove to Newark, Rooney directed Lori Mannicci, Esq., an associate in his office, to make travel arrangements for the trip to Europe. See Rooney Dep. at 156. Because Rooney did not have Oscar's passport, those travel arrangements included contacting the State Department to arrange for the child to be removed from the country without a passport. Id. at 165-66. Mannicci testified

that she could not remember anything about contacting the State Department to arrange for the passport waiver, including to whom she spoke. See Mannicci Dep. at 30-31. However, her handwritten notes from that afternoon include - on two separate pages -notations with "Ginny" Young's home telephone number. Id. at 19, 22-23 and Exhibits 9 and 10.

Rooney accompanied the child to Frankfort, Germany, and Kovacs was waiting for them in the airport when they arrived. See Rooney Dep. at 169.

Sometime thereafter, Egervary filed a motion for reconsideration before Judge Nealon. See Egervary II, 491 F. Supp. 2d at 504-507. At that time, Rooney sought a follow-up letter from Schuler in order to "reassure" himself. See Rooney Dep. at 194. Schuler's letter to Rooney stated:

> Dear Mr. Rooney,
>
> This is to thank you for effecting the prompt return of the child Oscar Egervary to his mother in Hungary under the auspices of the Hague Convention on the Civil Aspects of International Child Abduction, and to briefly review the background of the case . . .
>
> Oscar Egervary was born in the United States July 4, 1992, and at the age of approximately eight months was taken by his parents to Hungary, where both mother and father are citizens. (The father is also a U.S. citizen.) The parents separated in the summer of 1993 and the mother was granted temporary custody by a Hungarian court pending the couple's divorce.

Hungarian police reports indicate that in December 1993 the father and his brother accosted Mrs. Egervary in the street in Budapest and kidnapped the child. Mrs. Egervary attempted to hang on to the departing car, but fell off. She immediately filed a police report, and soon after filed an application for the return of her son under the Hague Convention which was received in this office in March, 1994.

At the time of his abduction, Oscar Egervary had lived for 10 months in Hungary and eight months in the United States. In addition, the information provided this office indicated that the parents had intended resettlement in Hungary, in that their car and personal effects had been sent there and an apartment in Pennsylvania had been vacated.

It seemed clear that Oscar Egervary's country of habitual residence was Hungary and that Mrs. Egervary's claim of unlawful removal and retention of her child under Article 3 of the Hague Convention was a valid one.

We located your name on a list of persons who had previously handled Hague Convention matters, and asked you to represent Mrs. Egervary. You agreed to assist on a pro bono basis.

Article 2 of the Convention asks that "the most expeditious procedures available" be utilized in effecting the implementation of Convention Precepts.

> We are grateful for your prompt, humane and professional assistance. I hope we can continue to request your help whenever cases of international abduction to or from Pennsylvania are brought to our attention. Thank you again for your assistance.[8]

See Schuler Ltr. (June 1, 1994).

---

[8] Like Young's earlier letter, Schuler's letter contained a number of factual assertions that are inconsistent with the sworn testimony and other evidence in this case.

For example, Schuler states that "at the age of eight months [Oscar] was taken by his parents to Hungary." See Schuler Ltr. at 1. Egervary testified that Kovacs alone took Oscar to Hungary in February 1993, ostensibly so that she could perform in a concert, and that they were scheduled to return on April 6, 1993. See Egervary Aff. (July 7, 1994) ¶ 2. According to Egervary he had purchased a plane ticket to fly to Hungary and escort them back on that date. Id.

Schuler next states that: "The parents separated in the summer of 1993 and the mother was granted temporary custody by a Hungarian court pending the couple's divorce." See Schuler Ltr. at 1. In the next paragraph, he recounts the alleged abduction in December 1993. Id. at 2. The chronology of these events appears to be misleading. According to Egervary, Kovacs did inform him that their marriage was over in the summer of 1993. See Egervary Aff. (July 7, 1994) ¶ 2. However, Kovacs did not seek temporary custody from the Hungarian courts until after the alleged abduction. See Hungarian Order (December 22, 1993) (Exhibit A to the ICARA Petition of May 13, 1994). In fact, temporary custody was granted on December 22, 1993, four days after the alleged abduction. Id. Schuler next states that: "At the time of his abduction, Oscar Egervary had lived for 10 months in Hungary and eight months in the United States." See Schuler Ltr. at 2. This claim ignores Egervary's contention that Kovacs began retaining Oscar in Hungary illegally as of May 1993 and hid the child from his father as of September 1993. See Egervary Aff. (June 9, 1994) ¶ 8; Egervary Aff. (July 7, 1994) ¶ 2.

Finally, Schuler asserts that "the parents had intended resettlement in Hungary." See Schuler Ltr. at 2. Egervary testified, however, that: "Although I moved some of my personal belongings from the United States to Hungary for use during that period, at no time did I plan to establish residency in Hungary, nor did I register with the Hungarian government as a resident." See Egervary Aff. (July 7, 1994) ¶ 2.

C. The History of This Action

Plaintiff filed the complaint in this action on April 17, 1996 in the Eastern District of Pennsylvania. It named Rooney, Burke, and Nallin (the "attorney defendants"), as well as Young and Schuler (the "federal defendants"). Count I alleged that the defendants violated plaintiffs due process rights under the Fifth Amendment by depriving him of custody of his child without notice or opportunity to be heard; Count II alleged that the defendants conspired to violate those rights.

The case was assigned to the Honorable E. Mac Troutman. By Memorandum and Order dated January 7, 1997, Judge Troutman found that venue was lacking in this District and gave plaintiff thirty days in which to move to transfer the case to the Middle District pursuant to 28 U.S.C. § 1406(a). See Egervary I, 1997 WL 9787, at *4-*5. Judge Troutman reasoned that venue would lie in this District, if at all, under 28 U.S.C. § 1391(b)(2), i.e., if "a substantial part of the events or omissions giving rise to the claim" occurred in this District. Id. at *4. Judge Troutman acknowledged that Rooney maintained his law offices in this District and that plaintiff alleged that the federal defendants had "contacted, encouraged, and directed" the attorney defendants in this District. Id. However, he did not find this alleged contact to be sufficiently substantial under § 1391(b)(2). Id. at *5. Pursuant to Judge Troutman's Order, plaintiff thereafter moved pursuant to § 1406(a) and the action was transferred.

In the Middle District, the case was assigned to Judge Nealon, who had heard the underlying ICARA petition. However, during a case management conference on December 11, 1997, Judge Nealon realized that he might be called as a witness and immediately recused himself. See Order (December 16, 1997). Thereafter, all of the remaining judges in the Middle District also recused themselves, and

the Honorable Sue L. Robinson of the United States District Court for the District of Delaware was designated to preside over the case in the Middle District.

By Order dated August 17, 1998, Judge Robinson dismissed the federal defendants from the case because she concluded that plaintiff had not sufficiently alleged that the proceedings before Judge Nealon were "in any way directed by, approved of, or even within the knowledge of the federal defendants. See Order (August 17, 1998) at 5-6. With the federal defendants dismissed from the case, venue in the Eastern District became proper pursuant to 28 U.S.C. § 1391(b)(l). Therefore, upon unopposed motion by plaintiff, Judge Robinson transferred the case back to the Eastern District pursuant to 28 U.S.C. § 1404(a), and it was reassigned to me.

Prior to the close of discovery, the attorney defendants filed a motion for summary judgment arguing that: 1) Egervary's due process rights had not been violated; and 2) even if his rights had been violated he could not recover in a Bivens suit because of certain defenses (namely, waiver, collateral attack, lack of damages, and immunity). By Memorandum and Order dated January 21, 2000,1 rejected these arguments. See Egervary II, 491 F. Supp. 2d at 492. Specifically, I found that Egervary had a fundamental liberty interest in the custody of his son (id. at 498-99) and therefore could not be deprived of custody without either prior process (id. at 501-02) or a prompt, state-initiated postdeprivation hearing (id. at 502-04). I also noted that the essential facts necessary to establish a violation of his due process rights were not in contention. Id. at 509. I therefore ordered the attorney defendants to brief whether summary judgment should be entered against them on the question of liability on the Bivens claim. Id. at 510.

In response to that Order, the attorney defendants argued that: 1) they were not state actors and/or federal agents who could be held liable in a Bivens suit; and 2) even if they were federal agents, they could assert a good faith defense to liability that precluded the entry of summary judgment against them. By Memorandum and Order dated August 15, 2000,1 accepted these arguments in part and rejected them in part. See Egervary II, 2000 WL 1160720. Specifically, I found that Nallin could not be held liable as a federal agent because he did not participate in executing the order that led to the deprivation of plaintiff s due process rights. Id. at *4-*6. Rooney and Burke, on the other hand, did participate in the execution of that order and therefore could be deemed federal agents for the purposes of Bivens. Id. at *5. However, given the Court of Appeals' decision in Jordan v. Fox. Rothschild. O'Brien & Frankel, 20 F.3d 1250, 1277 (3d Cir. 1994), I held that they could assert a good faith defense to liability. Id. at *6. I further concluded that whether they had acted in good faith was a jury question that precluded the entry of summary judgment in plaintiffs favor on the question of liability. Id.

After the summary judgment issues were resolved, Rooney and Burke were deposed for the first time. Rooney testified to a number of previously undisclosed facts regarding the federal defendants' alleged participation in the deprivation of plaintiff s due process rights. For example, Rooney testified that: 1) defendant Young asked Rooney to represent Kovacs, See Rooney Dep. at 55-56, and sent him Hungarian government documents regarding the alleged abduction and model ICARA pleadings (Id. at 63-64); 2) while he was preparing the ICARA petition he consulted with the State Department "a bunch of times" (Id. at 62); 3) someone from the State Department had called Judge Nealon's office that morning to inform the Court that a petition was going to be filed (Id. at 120-21); 4) he spoke with Schuler while he was in Judge Nealon's chambers in order to confirm that the child could be removed from

Egervary's custody and returned to Hungary without a hearing (Id. at 115-16, 131-32); and 5) the State Department arranged for a waiver of the child's passport so that he could be removed immediately from the country (Id. at 165-66). On this basis, plaintiff argued that Rooney's testimony had undermined the rationale for Judge Robinson's earlier order dismissing the federal defendants from the case and moved for leave to file an amended complaint reasserting claims against them. I granted that motion on March 6, 2001. Thereafter, the federal defendants filed a motion for reconsideration arguing that leave to amend was not appropriate. I denied the motion for reconsideration on March 23, 2001:

> . . . Rule 15 requires that leave to amend be freely given "when justice so requires." The federal defendants were dismissed from this case by Judge Robinson because she concluded that "plaintiff cannot prove that [the federal defendants] had any personal involvement in" the deprivation of plaintiff s due process rights. See Order dated August 17, 1998. There now is testimony that could give rise to a conclusion that these defendants were personally involved. Accordingly, I conclude that justice will be served by allowing the amendment.

See Order (March 23, 2001) at 3-4.

The amended complaint was filed on March 23, 2001. The federal defendants subsequently moved to dismiss the amended complaint, arguing that: 1) venue is lacking in this District; 2) the original complaint was not properly served; 3) the amended complaint is barred by the statute of limitations; and 4) they cannot he held liable because of the defense of qualified immunity. While the motion to dismiss

was pending, the federal defendants filed a motion for summary judgment alleging that they had no personal involvement in the constitutional tort.[9]

III. DISCUSSION

A. Venue

The federal defendants first argue that the amended complaint should be dismissed for improper venue pursuant to Fed. R. Civ. P. 12(b)(5). Specifically, they argue that: 1) the law of the case doctrine precludes me from reconsidering Judge Troutman's 1997 finding that venue is lacking in this District; and 2) if considered on the merits, venue is lacking. I disagree.

1. The Law of the Case Doctrine

The Court of Appeals has recognized that the law of the case doctrine "expresses the practice of courts generally to refuse to reopen what has been decided, not a limit to their power." Zichy v. City of Philadelphia, 590 F.2d 503, 508 (3d Cir. 19791 quoting Messinger v. Anderson, 225 U.S. 436, 444 (1912). "A judge need not follow a previous decision of the same issue in the same case if 'unusual circumstances' exist that permit a different conclusion." Hayman Cash Register Co. v. Sarokin, 669 F.2d 162, 169 (3d Cir. 19821 quoting Evans v. Buchanan, 555 F.2d 373, 378 (3d Cir. 1977). One "commonly recognized exception . . . exists if new evidence is available to the second judge when hearing the issue." Id. In such a situation, "the question has not really been decided earlier and is posed for the first time; the

---

[9] In fact, the motion for summary judgment was filed on the same day as the federal defendants' reply brief in support of the motion to dismiss. I will cite the reply brief in support of the motion to dismiss as "Federal Defendants' Reply Br. (July 9, 2001)." I will cite the brief in support of the motion for summary judgment as "Federal Defendants' Br. (July 9, 2001)."

second judge ought, therefore, to be free to render a decision." Id., quoting United States v. Wheeler, 256 F.2d 745, 748 (3d Cir. 1958).

When Judge Troutman decided the venue question in 1997, he considered plaintiffs general allegation that "Rooney and Burke maintained their legal offices in this district, and as such, defendants Young and Schuler . . . contacted, encouraged, and directed Rooney in this district." See Egervary I, 1997 WL 9787, at *4. He did not, however, have available to him the evidence since produced in discovery regarding the nature and extent of those contacts and how those contacts relate to the alleged due process violation. Specifically, Judge Troutman did not know that:

- Young contacted Rooney in his office in the Eastern District and asked him to represent Kovacs. See Rooney Dep. at 59-60. She later faxed him copies of model pleadings published by the American Bar Association and Hungarian government documents related to Kovacs' allegations. Id. at 62-64.

- While he was preparing the ICARA petition Rooney consulted with the State Department "a bunch of times" from his office in the Eastern District. Id. at 62;

- Rooney "relied" on the federal defendants' assistance in preparing the petition because he "was not extremely well-versed on The Hague." Id.;

- This reliance included finding out "where the child was" and establishing the facts to be presented in the petition. Id. at 62-63, 86-89. In fact, Rooney never spoke to Kovacs or her family prior to presenting the petition. Id. at 74; and

- After Rooney had taken custody of Oscar, he directed his associate Lori Mannicci, working from his office in the Eastern District, to make arrangements to remove the child from this country, including consulting with the State Department for a passport waiver. Id. at 156, 165-66; Mannicci Dep. at 8.[10]

This new evidence is sufficient to justify reconsideration of venue under the law of the case doctrine and, in my view, is sufficient to establish venue in this District.

2. A Substantial Part of the Events Giving Rise to the Claim

As Judge Troutman observed, "it is clear that neither § 1391(b)(l) or § 1391(b)(3) applies in the present situation."[11] Egervary I, 1997 WL 9787, at *4. Venue must therefore be viewed under the requirements of § 1391(b)(2), which provides that "[a] civil action wherein jurisdiction is not founded solely on diversity of citizenship may ... be brought only in ... a judicial district in which a substantial part of the events or omissions giving rise to the claim occurred." This language reflects a 1990 amendment which "changed pre-existing law to the extent that the earlier version had

---

10 Plaintiff also argues that Rooney "likely" transported Oscar through the Eastern District on their way to Newark International Airport. See Plaintiffs Br. (June 19, 2001) at 8. However, there is no specific testimony on this issue. Moreover, I take judicial notice that the most direct route from Cresco, PA (where Egervary resided) to Newark, NJ is via Interstate 80 in Monroe County, a route does not pass through the Eastern District. Therefore, I reject this argument.

11 Judge Troutman also observed that the venue provision of § 1391(e), which on its face would appear to govern this case, does not apply because of the Supreme Court's decision in Stafford v. Briggs, 444 U.S. 527 (1980) (venue provision of § 1391(e) does not apply to actions for money damages against federal officials in their personal capacities). See Egervary I, 1997 WL 9787, at *4.

encouraged an approach that a claim would generally arise in only one venue." Cottman Transmission Svs. Inc. v. Martino, 36 F.3d 291, 294 (3d Cir. 1994). In other words, "the statute no longer requires a court to select the 'best' forum." Id. "This expanded venue statute should be construed broadly." Bowdoin v. Oriel, No. 98-5539, 1999 WL 391486, at * 5 (E.D. Pa. May 5, 1999). "The defendant bears the burden of showing improper venue in connection with a motion to dismiss." Myers v. Am. Dental Assoc, 695 F.2d 716, 725 (3d Cir. 1983).

The federal defendants argue that the new evidence summarized above "adds nothing of significance" for the purposes of determining venue. They also argue that contacting the State Department for a passport waiver does not have "anything of significance to do with the alleged deprivation of plaintiff s right to due process." See Federal Defendants' Reply Br. (July 9, 2001) at 5-6 n.3. I disagree.

Courts in this District have previously found that telephone calls that take place in this District can constitute events sufficient to establish venue in this District, even where "more substantial" events occurred outside of this District. See, e.g. Nowicki v. United Timber Co., No. 99-257, 1999 WL 619648, at *1 n.l (E.D. Pa. Aug. 12, 1999) (Yohn, J.) (contract negotiations via telephone sufficient to establish venue in this District even though contract was signed in New York and dealt with property located in the Middle District); Bowdoin, 1999 WL 391486, at *5 (Bartle, J.) (in diversity action between Florida and Massachusetts residents, venue was proper in the Eastern District because defendant had telephone conversations with now-deceased, non-party co-conspirator who lived in the Eastern District). As was the case in Nowicki and Bowdoin, the telephone calls that took place in this District allegedly "gave rise to" the conduct that occurred outside of this District. Cf, 28 U.S.C. § 1391(b)(2). The gravamen of plaintiffs claim against the federal defendants is that they conspired with, gave

substantial assistance or encouragement to, and/or ordered or induced Rooney to take custody of Oscar in violation of plaintiff s due process rights.[12] That conduct is alleged to have taken place by way of telephone calls to this District, and consistent with Nowicki and Bowdoin that is sufficient to establish venue under § 1391(b)(2).

Of particular importance to this conclusion is plaintiffs allegation that arrangements to have the child removed from this country without a passport were made in this District. The federal defendants imply that the removal of the child was irrelevant to the due process violation. However, as I noted in Egervary II, the immediate removal of the child consummated the due process violation by making a prompt, state-initiated postdeprivation hearing impossible. See Egervary II 491 F. Supp. 2d at 502 n.7. citing Weller v. Dep't of Soc. Servs., 901 F.2d 381, 396 (4th Cir. 1990), and Hooks v. Hooks, 771 F.2d 935, 942-43 (6th Cir. 1985). See also infra Part III-E-3-f.

I therefore conclude that a substantial part of the events giving rise to plaintiffs claim occurred in this District and venue is proper under § 1391(b)(2).

B. Service of Process

The federal defendants next argue that the amended complaint should be dismissed for insufficient service of process pursuant to Fed. R. Civ. P. 12(b)(5). I disagree.

1. Rule 4 and Pa. R. Civ. P. 403

The starting point for this discussion is Rule 4(i)(2)(b), which states:

---

12 The characterization "conspired with, gave substantial assistance or encouragement to, and/or ordered or induced" tracks the requirements of Restatement (Second) of Torts §§ 876 and 877(a). See infra Part III-E-2.

> Service on an officer or employee of the United States sued in an individual capacity for acts or omissions occurring in connection with the performance of duties on behalf on the United States - whether or not the officer or employee is sued also in an official capacity - is effected by serving the United States in the manner prescribed by Rule 4(i)(l) and by serving the officer or employee in the manner prescribed by Rule 4 (e), (f), or (g).

The parties agree that the first part of this Rule was satisfied, i.e., plaintiff properly served the United States pursuant to Rule 4(i)(l) by sending copies of the summons and complaint to the United States Attorney for the Eastern District of Pennsylvania and the Attorney General of the United States. The parties disagree, however, about whether plaintiff properly effectuated personal service on the federal defendants pursuant to Rule 4(e), (f), or (g).

The federal defendants first raised the service issue in their motion to dismiss the original complaint in 1996. At that time, they argued that plaintiff had attempted to effect service under 28 U.S.C. § 1391(e)[13] when in fact he should have attempted to effect service under Pa. R. Civ. P. 402(a)(l) & (2).[14] See Federal Defendants' Br. (August 7, 1996) at 34.

Plaintiff responded by arguing that he had not attempted service pursuant to § 1391(e). See Plaintiffs Br. (September 24, 1996) at 19. Instead, he argued, he had served the United States pursuant to Rule 4(i)(l) and had served the federal defendants personally pursuant to Rule

---

13 Section 1391(e) permits service by certified mail upon federal officers sued in their official capacity. However, § 1391 does not apply to personal-capacity claims against federal officers (including Bivens claims). See Stafford v. Briggs, 444 U.S. 527, 542-45 (1980).

14 The federal defendants did not explain why service could be effectuated pursuant to Pa. R. Civ. P. 402.

4(e)(l), which provides for personal service "pursuant to the law of the state in which the district court is located." Id. at 20-21. Specifically, he argued, he had personally served Young and Schuler pursuant to Pa. R. Civ. P. 403 by sending copies of the summons and complaint to their place of business by certified mail.

The federal defendants subsequently filed a reply brief but did not respond to plaintiffs argument. See Federal Defendants' Br. (October 18, 1996). Judge Robinson later granted the motion to dismiss but did not address the service of process issue.[15] See Order (August 17, 1998).

The federal defendants now renew the service of process argument, but their theory has changed. They now agree with plaintiff that the sufficiency of the personal service should be viewed in terms of Pa. R. Civ. P. 403. See Federal Defendants' Br. (May 11, 2001) at 13-14. They argue, however, that plaintiff failed to effect service pursuant to Pa. R. Civ. P. 403 because plaintiff cannot prove that an "agent" of the federal defendants signed the return receipt that accompanied the copies of the complaint sent to the federal defendants at their place of business.

Plaintiff initially responds by arguing that the federal defendants have waived the opportunity to challenge the sufficiency of process under Pa. R. Civ. P. 403 because the issue was not raised in the original motion to dismiss.[16] I disagree. Fed. R. Civ. P. 12(h)(l) provides that the defense of insufficient service of process is waived if it is not

---

15 The motion to dismiss was filed in 1996 when the case was before Judge Troutman. However, because of the § 1406(a) transfer it was not decided until 1998 when the case was before Judge Robinson.

16 The federal defendants deny that their new theory is inconsistent with the theory presented to Judge Robinson in 1998. See Federal Defendants' Reply Br. (July 9, 2001) at 10 n.7. As can clearly be seen from the summary of their arguments that appears above, that assertion is without merit.

raised in the defendant's first responsive pleading or motion. Plaintiff has cited no support for the proposition that Rule 12(h)(l) requires every argument in support of the defense to be perfectly fleshed-out the first time it is stated. In my view, the federal defendants properly raised and preserved the defense and the latest version of their argument in support of the defense should be addressed on the merits.

I conclude, however, that the present record is insufficient to determine whether plaintiff has satisfied the Pennsylvania Rule. Pa. R. Civ. P. 403 provides:

> If a rule of civil procedure authorizes original process to be served by mail, a copy of the process shall be mailed to the defendant by any form of mail requiring a receipt signed by the defendant or his authorized agent. Service is complete upon delivery of the mail.

The Court of Appeals considered this provision in Lampe v. Xouth. Inc., 952 F.2d 697 (3d Cir. 1991). The Lampe Court found that "Pennsylvania Rule 403 requires ... a receipt signed by the defendant or his authorized agent." Id. at 701. It went on to find that Rule 403 had not been satisfied in that case because the plaintiff had not proved that the signatures on the return receipts that had accompanied copies of the complaint and summons belonged to either the defendants or their agents. Id.

In this case, plaintiff has produced return receipts that were sent to the federal defendants' place of business and signed by someone named "L. [or possibly F.] Barton." See Plaintiffs Br. (June 19, 2001) at 15 n.7; Affidavit of Gary L. Azorsky, Esq. (May 9, 1996) at Exhibits A and B. No party has offered any explanation as to who this individual is. I therefore cannot determine whether plaintiff has met the requirements of Pa. R. Civ. P. 403 as set out in Lampe.

2. 22 C.F.R. § 172.2

The parties differ on the appropriate course of action I should take if I find that I cannot decide whether plaintiff has satisfied Pa. R. Civ. P. 403. Plaintiff argues that "[a]t the very least, Mr. Egervary should be permitted to conduct limited discovery on the question of the identity of the signatory of the return receipt card, so as to be able to define that person's authority to accept service for the federal defendants." See Plaintiffs Br. (June 19, 2001) at 17. The federal defendants' only response to this request for limited discovery is to characterize it as "lame."[17] See Federal Defendant's Reply Br. (July 9, 2001) at 12.

In my view, however, discovery is not the appropriate course of action because service can be perfected promptly. Allowing plaintiff to perfect service is consistent with the Rules and case law. Rule 4(i)(3)(A) provides that a court "shall allow a reasonable time to serve process under Rule 4(i) for the purpose of curing the failure to serve ... all persons required to be served." Similarly, Rule 4(m) provides that a court "shall extend the time for service for an appropriate period" if the plaintiff shows "good cause" for the failure to serve within the prescribed period. Here, the federal defendants' failure to raise the Rule 403 theory until five years after service was attempted constitutes "good cause." Similarly, the Court of Appeals has stated that:

---

[17] I note that the federal defendants have made an additional argument that, while not made in response to the request for discovery, would negate the need for discovery if accepted. They argue that Pennsylvania law does not permit service of process at an individual's place of employment. See Federal Defendant's Br. (May 11, 2001) at 15. This argument fails because the Lampe Court clearly implied that service by certified mail at the defendant's place of business would have been acceptable under Rule 403 if the return receipt had been signed by the defendant's authorized agent. See Lampe, 952 F.2d at 701.

> Upon determining that process has not been properly served on a defendant, district courts possess broad discretion to either dismiss the plaintiffs complaint for failure to effect service or to simply quash service of process. However, dismissal of a complaint is inappropriate when there exists a reasonable prospect that service may yet be obtained.

See Umbenhauer v. Woog, 969 F.2d 25, 30 (3d Cir. 1992). For the following reasons, I find that there is more than a "reasonable prospect" that proper service may yet be obtained.

The federal defendants have repeatedly quoted a portion of 22 C.F.R. § 172.2 for the proposition that "the [State] Department is not an authorized agent for service of process with respect to civil litigation against Department employees purely in their personal, non-official capacity." See Federal Defendants' Br. (May 11, 2001) at 15; Federal Defendants' Reply Br. (July 9, 2001) at 12. This portion of § 172.2 is not relevant to this case. Plaintiff has not made claims against the federal defendants "purely in their personal, non-official capacity." Rather, plaintiff has made claims against them "in an individual capacity for acts or omission occurring in connection with the performance of duties on behalf of the United States." Cf, Fed. R. Civ. P.

However, the remainder of § 172.2, to which the federal defendants have not referred, does apply to this case. It states: "[T]he Executive Office of the Legal Adviser (L/EX) is authorized to receive and accept summonses or complaints sought to be served upon the Department or Department employees." See 22 C.F.R. § 172.2(a). The regulation goes on to state, in the sentence immediately following the one quoted by the federal defendants, that: "Copies of summonses or complaints directed to

Department employees in connection with legal proceedings arising out of the performance of official duties may ... be served upon L/EX."[18] See 22 C.F.R. § 172.2(c).

I will therefore deny the federal defendants' motion to dismiss pursuant to Rule 12(b)(5) and allow the plaintiff to perfect service pursuant to 22 C.F.R. § 172.2 within 30 days.

C. Statute of Limitations

The federal defendants next argue that the amended complaint is barred by the statute of limitations. I disagree.

The federal defendants concede that plaintiff filed the first complaint within the two year statute of limitations for Bivens actions in Pennsylvania.[19] They argue, however, that the amended complaint was filed after the limitations period had run and that "a statute of limitations is not tolled by the filing of a complaint subsequently dismissed without prejudice." See Federal Defendants Br. (May 11, 2001) at 17, quoting Cardio-Medical Aassoc. Ltd. v. Crozer-Chester Med. Ctr., 721 F.2d 68, 77 (3rd Cir. 1983).[20]

---

18 The regulation also states that: "All such documents should be delivered or addressed to The Executive Office, Office of the Legal Adviser, room 5519, United States Department of State, 2201 C Street, NW, Washington, DC 20520-6310." See 22 C.F.R. § 172.2(a).

19 The statute of limitations for a Bivens action is the statute of limitations for personal injuries in the state where the tortious act occurred. See Napier v. Thirty or More Unidentified Federal Agents, 855 F.2d 1080, 1087-88 n.3 (3d Cir. 1988). Under Pennsylvania law, an action for personal injuries must be commenced within two years of the accrual of the cause of action. See 42Pa.C.S.A. §5524.

20 Curiously, however, they concede that plaintiff could still appeal Judge Robinson's dismissal of the first complaint. Id. at 19 n. 10. If plaintiff prevailed in that appeal, the federal defendants thereafter would be required to litigate the same issues they currently face.

1. Rule54(b)

In the cases relied upon by the federal defendants, the first complaint had been dismissed without prejudice and a new complaint was filed in a separate action. In such situations, a statute of limitations is not tolled by the filing of the first complaint. Here, however, the complaint was dismissed with prejudice as to two defendants but survived as to the remaining defendants. This situation is expressly covered by Rule 54(b):

> When more than one claim for relief is presented in an action, whether as a claim, counterclaim, cross-claim, or third-party claim, or when multiple parties are involved, the court may direct the entry of a final judgment as to one or more but fewer than all of the claims or parties only upon an express determination that there is no just reason for delay and upon an express direction for the entry of judgment. In the absence of such determination and direction, any order or other form of decision, however designated, which adjudicates fewer than all claims or the rights and liabilities of fewer than all the parties shall not terminate the action as to any of the claims or parties, and the order or other form of decision is subject to revision at any time before the entry of judgment adjudicating all the claims and the rights and liabilities of all the parties.

Fed. R. Civ. P. 54(b) (emphasis added). Because no final judgment was entered after Judge Robinson's dismissal order, the action did not terminate as to the federal defendants and Judge Robinson's order was "subject to revision at any time." Id.

In order to avoid the obvious impact of Rule 54(b) on their statute of limitations argument, the federal defendants argue that Judge Robinson's dismissal order was never "revised" within the meaning of the Rule:

> A fundamental problem with plaintiffs theory is that he never sought to have the court revise Judge Robinson's decision dismissing the Federal Defendants from the case and the Court never determined that, given the facts presented in plaintiffs original complaint, Judge Robinson's ruling was in error or subject to revision.

See Federal Defendant's Reply Br. (July 9, 2001) at 14.

This argument lacks merit. As I stated in my Order of March 23, 2001:

> . . . Rule 15 requires that leave to amend be freely given "when justice so requires." The federal defendants were dismissed from this case by Judge Robinson because she concluded that "plaintiff cannot prove that [the federal defendants] had any personal involvement in" the deprivation of plaintiff s due process rights. See Order dated August 17, 1998. There is now testimony that could give rise to a conclusion that these defendants were personally involved. Accordingly, I conclude that justice will be served by allowing the amendment.

See Order (March 23, 2001) at 3-4.

The federal defendants are correct that I never held that "Judge Robinson's ruling was in error"; however, I need not make such a determination. Viewing the newly discovered evidence in the light most favorable to plaintiff, it can no longer be said that the proceedings before Judge Nealon were not "in any way directed by, approved of, or even within the knowledge of the [federal defendants]." Cf Order (August 17, 1998) at 5-6. Nothing in Rule 54(b) states or implies that a valid "revision" of an "order or other form of decision" dismissing fewer than all of the parties cannot be made unless the court concludes that the order was in error at the time it was entered.[21] Judge Robinson's order did not terminate the action against the federal defendants and the amended complaint is not barred by the statute of limitations if it relates back to the original complaint.

2. Rule 15(c) and the Relation Back Doctrine

Rule 15(c)(2) states: "An amendment of a pleading relates back to the date of the original pleading when . . . the claim or defense asserted in the amended pleading arose out of the conduct, transaction, or occurrence set forth or attempted to be set forth in the original pleading." This provision means what it says:

---

[21] Moreover, the federal defendants' argument that a court cannot make a valid revision of an order under Rule 54(b) unless it finds that the order was wrong when decided makes little sense when Rule 54(b) is read in para materia with Rule 60(b), which provides, inter alia, for relief from a final judgment on the basis of newly discovered evidence. If the federal defendants' view were correct, an unsuccessful plaintiff with newly discovered evidence could seek relief from a final judgment under Rule 60(b) but could not seek to revise a non-final dismissal order under Rule 54(b).

> [A]mendments that merely correct technical deficiencies or expand or modify the facts alleged in the earlier pleading meet the Rule 15(c) test and will relate back. Thus, amendments that do nothing more than restate the original claim with greater particularity or amplify the details of the transaction alleged in the preceding pleading fall within Rule 15(c).

See 6A Wright, Miller & Kane, Federal Practice and Procedure § 1497 (2d ed. 1990).

Rule 15(c)(2) obviously applies to the amended complaint in this case, which merely restates the allegations of the original complaint with greater particularity. The federal defendants do not discuss Rule 15(c)(2) in their initial brief, and the discussion in their reply brief is limited to the following passage:

> Plaintiff argues that his claims against the Federal Defendants in the Amended Complaint relate back to the filing of the original complaint under Rule 15(c)(2) of the Federal Rules of Civil Procedure because the Amended Complaint did not change "the party or the naming of the party" against who [sic] the claim is asserted. See Plaintiff s Brief at 28-29. Plaintiff further argues that even if Rule 15(c)(3) of the Federal Rules of Civil Procedure is applicable, his amended complaint relates back to the filing of the original complaint because there was a "mistake" in the naming of the party. Id. at 29-31. Plaintiff is wrong on both counts.

See Federal Defendants' Reply Br. (July 9, 2001) at 16. Rule 15(c)(2) is never mentioned again, however, and the reader is left wondering why "plaintiff is wrong on [that] count." Id. Instead, the federal defendants embark on a three page discussion of Rule 15(c)(3).[22] There are, however, two problems with their discussion.

First, Rule 15(c)(3) does not apply to this situation. Rule 15(c)(3) applies to an "amendment [that] changes the party or the naming of the party against whom a claim is asserted." The Advisory Committee notes illustrate the circumstances where the Rule applies:

> The problem has arisen most acutely in certain actions by private parties against officers or agencies of the United States. Thus an individual denied social security benefits by the Secretary of Health, Education, and Welfare may secure review of the decision by bringing a civil action against that officer within sixty days. 42 U.S.C. § 405(g) (Supp. IE, 1962). In several recent cases the claimants instituted timely action but mistakenly named as defendant the United States, the Department of HEW, the "Federal Security

---

22 Rule 15(c)(3) provides:

> An amendment of a pleading relates back to the date of the original pleading when . . . the amendment changes the party or the naming of the party against whom a claim is asserted if the foregoing provision (2) is satisfied and, within the period provided by Rule 4(m) for service of the summons and complaint, the party to be brought in by amendment (A) has received such notice of the institution of the action that the party will not be prejudiced in maintaining a defense on the merits, and (B) knew or should have known that, but for a mistake concerning the identity of the proper party, the action would have been brought against the party.

> Administration" (a nonexistent agency), and a Secretary who had retired from office nineteen days before. Discovering their mistakes, the claimants moved to amend their complaints to name the proper defendant; by this time the statutory sixty-day period had expired. The motions were denied on the ground that the amendment "would amount to the commencement of a new proceeding and would not relate back in time so as to avoid the statutory provision . . . that suit be brought within sixty days."

See Fed. R. Civ. P. 15 Advisory Committee Notes (1966 Amendment). The present case is not such a situation. Yet, the federal defendants argue that "plaintiff offers no explanation of his assertion that his amended complaint did not change 'the party or the naming of the party' against whom a claim is made." See Federal Defendants' Reply Br. (July 9, 2001) at 16. This argument is incomprehensible for two reasons. First, the explanation is self-evident. The original complaint named Virginia Young and James Schuler. See Complaint ¶¶2, 3. The amended complaint also names Virginia Young and James Schuler. See Amended Complaint ¶¶2, 3. Second, the federal defendants themselves have previously stated that "[h]ere, there was no mistake concerning the identity of the Federal Defendants; plaintiff Egervary brought suit against the Federal Defendants in his original Complaint." See Federal Defendants' Br. (May 11, 2001) at 20.

Second, even if Rule 15(c)(3) did apply to this case, plaintiff has met the requirements of that Rule. In most circumstances, a plaintiff invoking Rule 15(c)(3) must prove that the newly named party "(A) has received such notice of the institution of the action that the party will not be prejudiced in maintaining a defense on the merits, and (B) knew or should have known that, but for a mistake

concerning the identity of the proper party, the action would have been brought against the party." See Fed. R. Civ. P. 15(c)(3). However, these requirements generally do not apply to federal defendants. The Rule goes on to state that:

> The delivery or mailing of process to the United States Attorney, or United States Attorney's designee, or the Attorney General of the United States, or an agency or officer who would have been a proper defendant if named, satisfies the requirement of subparagraphs (A) and (B) of this paragraph (3) with respect to the United States or any agency or officer thereof to be brought into the action as a defendant. See Fed. R. Civ. P. 15(c).

The federal defendants admit plaintiff correctly and timely served the United States Attorney for the Eastern District of Pennsylvania and the United States Attorney General. See Federal Defendants' Br. (May 11, 2001) at 11. Yet, rather than acknowledging that that service relieved plaintiff from the requirements of Rule 15(c)(3)(A) and (B), the federal defendants ignore the provision quoted above and engage in an extended discussion of Rule 15(c)(3)(B).[23] See Federal Defendants' Br. (May 11, 2001) at 19-20; Federal Defendants' Reply Br. (July 9, 2001) at 16-18.

I conclude that the amended complaint relates back to the original complaint pursuant to Rule 15(c)(2).

---

[23] Although they never so state explicitly, the federal defendants' preoccupation with Rule 15(c)(3) seems to be based on the incorrect assumption that a plaintiff must satisfy all three subsections of Rule 15(c) in order for an amendment to relate back. The text of Rule 15(c) clearly states, however, that an amendment relates back if it satisfies subsection (1), (2), or (3), though subsection (3) subsumes the requirements of subsection (2).

3. Equitable Estoppel

Finally, even if Rules 15(c)(2) and 54(b) did not apply, I would hold that the federal defendants are equitably estopped from asserting the statute of limitations because of their concealment of their personal involvement in this case.

Under Pennsylvania law, a defendant is estopped from invoking the statute of limitations where "through fraud or concealment, the defendant causes the plaintiff to relax his vigilance or deviate from his right of inquiry." Schaffer v. Larzelere, 189 A.2d 267, 269 (Pa. 1963). The defendant's conduct "need not rise to the level of fraud or concealment in the strictest sense, that is an intent to deceive; unintentional fraud or concealment is sufficient." Krevitz v. City of Philadelphia, 648 A.2d 353, 357 (Pa. Cmwlth. 1994). Courts have held, however, that "[m]ere mistake, misunderstanding or lack of knowledge is not sufficient to toll the running of the statute." Schaffer, 189 A.2d at 269. Moreover, "mere silence or nondisclosure is not enough to trigger estoppel." Krevitz, 648 A.2d at 357. Rather, the adversary "must commit some affirmative independent act of concealment upon which the plaintiffs justifiably rely in order to toll the statute." Id. A court may find an estoppel "only in clear cases of fraud, deception, or concealment" and plaintiff has the burden of making such a showing. Belfi Brothers & Co. v. Safeco Ins. Co. of Am., No. 94-0844, 1994 WL 591762, at *4 (E.D. Pa. Oct. 28, 1994).

In my view, the federal defendants concealed their personal involvement in this case when in response to the original complaint they immediately moved to stay discovery, an affirmative act, and dismiss the complaint. In that motion, they argued that plaintiff had failed "to substantiate his claims with a single fact showing that defendants Young and Schuler, or any other State Department official, had any involvement in the removal of

the child without notice." See Federal Defendants' Br. (August 7, 1996) at 10. On this basis, Judge Robinson concluded that "plaintiff cannot prove that the moving defendants had any personal involvement in, nor did they conspire to, deprive plaintiff of his right to due process." See Order (August 18, 1998) at 6. Yet, discovery had since yielded more than "a single fact" that arguably shows that the federal defendants were personally involved in the events of this case:

- Young contacted and retained Rooney on behalf of Kovacs. See Rooney Dep. At 59-60. She later faxed him Hungarian government documents and copies of model ICARA pleadings published by the American Bar Association. Id. at 62-64.

- Rooney "relied" on the federal defendants' assistance in drafting the petition presented to Judge Nealon and spoke to them about it "a bunch of times." See Rooney Dep. at 62. He never, on the other hand, spoke with his client, Kovacs, or any member of her family in order to prepare the petition. Id. at 74. The factual representations he later made to Judge Nealon were based entirely on conversations with the federal defendants and the Hungarian government documents that he received from the federal defendants. Id. at 86-89.

- The federal defendants contacted Judge Nealon's chambers on May 13, 1994 to inform the Court that a Hague Convention petition would be presented that day. Id. at 120-21.

- During the presentation to Judge Nealon, Rooney called the State Department and spoke with James Schuler to confirm that Judge Nealon could order that the child be returned to Hungary immediately. Id. at 115-16, 131-32. Rooney also called them thereafter from the Marshal's office and on the road to Newark. See Burke Dep. at 70-71. He was "continuously in conversation" with them that day. Id.

- After the child had been taken from plaintiffs custody, the State Department arranged for a passport waiver so that the child could be removed from the country that same day.

See Rooney Dep. at 165-66. See also Mannicci Dep. at 19,22-23,30-31.

The federal defendants did not literally misrepresent the extent of their involvement to Judge Robinson, i.e., they did not specifically deny that they had any personal involvement. Rather, they argued that claims against government officials are subject to a heightened pleading standard and plaintiff had failed to meet that standard. See Federal Defendants' Br. (August 7, 1996) at 16-27. However, in order for equitable estoppel to apply their conduct "need not rise to the level of fraud or concealment in the strictest sense." Krevitz, 648 A.2d at 357. The federal defendants effectively hid behind the heightened pleading standard, causing plaintiff to do more than just "relax his vigilance." See Schaffer, 189 A.2d at 269. As a result of the federal defendants' strategy, plaintiff was forced to "deviate from his right of inquiry" by operation of a court order that at their request initially stayed discovery and later led to dismissal of the complaint. Id.

The federal defendants respond to this conclusion by arguing the following:

> In their original motion to dismiss, the Federal Defendants argued, as they plainly were entitled to do, that the plaintiffs complaint, on its face, failed to sufficiently state a claim against them for violation of constitutional rights. They also argued, as they were plainly entitled to do, that discovery was not appropriate because they had raised the defense of qualified immunity. These perfectly legitimate arguments by the Federal Defendants cannot form the basis for some claim of fraud or concealment sufficient to justify equitable estoppel or equitable tolling.

See Federal Defendants' Reply Br. (July 9, 2001) at 21.

I agree with the premise of this argument but disagree with the conclusion. Certainly, the federal defendants had the right to assert that a heightened pleading standard applied to plaintiffs' claim. Equity, however, should not allow them to benefit from a strategy that delayed the discovery of evidence of their personal involvement.

I therefore conclude that the amended complaint is not barred by the statute of limitations.

D. Qualified Immunity

The federal defendants next argue that they are entitled to qualified immunity.[24] I disagree.

Under the qualified immunity doctrine, government officials performing discretionary functions are generally "shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982). The Supreme Court has directed courts evaluating claims of qualified immunity to proceed in two steps: a court "must first determine whether the plaintiff has alleged the deprivation of an actual constitutional right at all, and if so, proceed to determine whether that right was clearly established at the time of the alleged violation." Wilson v. Lavne, 526 U.S. 603, 608 (1999).

1. Due Process Violation

The Due Process Clause of the Fifth Amendment states that no person shall "be deprived of life, liberty, or property without due process of law." See U.S. Const, amend. V. "Many controversies have raged about the cryptic and abstract words of the Due Process Clause but there can be no doubt that at a minimum they require that deprivation of life, liberty or property by adjudication be preceded by notice and opportunity for hearing appropriate

---

[24] The federal defendants originally raised this issue in their motion to dismiss. However, they later supplemented that analysis in their motion for summary judgment. See Federal Defendants' Br. (July 9, 2001) at 14-17. I will therefore address the qualified immunity issue under the summary judgment standard. See Fed. R. Civ. P. 12(b) ("If, on a motion asserting the defense numbered (6) to dismiss for failure of the pleading to state a claim upon which relief can be granted, matters outside the pleading are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided in Rule 56."). See also infra Part III-E-l.

to the nature of the case." Mullane v. Central Hanover Bank & Tr. Co., 339 U.S. 306. 313 (19501 Neither of these "fundamental requisite[s]" of due process is satisfied by mere pretense. Id. at 314. Notice must be "reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action" (Id.), and the opportunity to be heard "must be granted at a meaningful time and in a meaningful manner." Armstrong v. Manzo, 380 U.S. 545, 552 (1965).

Procedural due process questions are examined in two steps. See Kentucky Dep't. of Corrections v. Thompson, 490 U.S. 454, 460 (1989). The first step "asks whether there exists a liberty interest which has been interfered with by the State." Id. If there is such an interest, the second step asks "whether the procedures attendant upon that deprivation were constitutionally sufficient." Id.

a. Liberty Interest

An abundance of case law supports the conclusion that plaintiff had a fundamental liberty interest in the custody of his child. See Hollingsworth v. Hill, 110 F.3d 733, 739 (10th Cir. 1997) (in a Section 1983 suit brought by a mother whose children were removed from her custody without prior notice, the mother had "a constitutionally protected liberty interest [in the custody of her children] which could not be deprived without due process"); Jordan v. Jackson, 15 F.3d 333, 342 (4th Cir. 1994) (in a Section 1983 suit brought by parents whose son was removed from their custody without prior notice, the court found that there "are few rights more fundamental in and to our society than those of parents to retain custody over and care for their children, and to rear their children as they deem appropriate"); Weller v. Dep't. of Soc. Servs. , 901 F.2d 387, 391 (4th Cir. 1990) (in a Section 1983 suit brought by a father whose children were removed from his custody without prior notice, the father "clearly [had] a protectible liberty

interest in the care and custody of his children"); Robison v. Via, 821 F.2d 913, 921 (2d Cir. 1987) (in a Section 1983 suit brought by a mother whose children were removed from her custody without prior notice, "it was clearly established that a parent's interest in the custody of his or her children was a constitutionally protected interest of which he or she could not be deprived without due process"); Hooks v. Hooks, 771 F.2d 935, 941 (6th Cir. 1985) (in a Section 1983 suit brought by a mother whose children were removed from her custody without prior notice, the court found that it is "well-settled that parents have a liberty interest in the custody of their children"); Lossman v. Pekarske, 707 F.2d 288, 290 (7th Cir. 1983) (in a Section 1983 suit brought by a father whose children were removed from his custody without prior notice, the father "unquestionably" had a liberty interest in the custody of his children); Duchesne v. Sugarman, 566 F.2d 817, 825 (2d Cir. 1977) (in a Section 1983 suit brought by a mother whose children were removed from her custody without prior notice, the court found a liberty interest in "the most essential and basic aspect of familial privacy, the right of the family to stay together without the coercive interference of the awesome power of the state").

It is also clear that plaintiff had a fundamental liberty interest in the custody of his son even though his estranged wife contested legal custody. Courts have recognized a parent's liberty interest in the physical custody of a child even when the parent lacks legal custody. For example, in Farina v. City of Tampa, 874 F. Supp. 383 (M.D. Fla. 1994), prospective adoptive parents sued the city police after officers returned the child to his biological parents without any prior notice or judicial proceedings. Id. at 384-85. The defendants conceded the underlying facts and acknowledged that the operative law provided for notice and opportunity to be heard before custody decisions are made. Id. at 385. Defendants argued, however, that plaintiffs had no protected liberty interest because they had only physical, not legal, custody of the child. The court flatly

rejected that distinction and found "no authority in support of [defendants'] distinction between physical and legal custody for procedural due process purposes." Id. at 386. On this basis, the court granted partial summary judgment in favor of the plaintiffs. Id. at 387.

Plaintiff therefore had a fundamental liberty interest in the continued physical custody of his son.

b. The Constitutional Sufficiency of the Process

Since Egervary had a fundamental liberty interest in the custody of his son, the child could not be removed from his custody without either prior process or a prompt, state-initiated postdeprivation hearing.

Obviously, plaintiffs due process rights would not have been violated if he had received notice and opportunity to be heard prior to Oscar's removal from his custody. However, "due process is flexible and calls for such procedural protections as the particular situations demands." Morrissey v. Brewer, 408 U.S. 471, 481 (1972). For this reason, courts have found that even though parents have a fundamental liberty interest in the custody of their children they do not always have a right to prior process when the state removes their children from their custody.

Courts agree that "in emergency circumstances which pose an immediate threat to the safety of a child, officials may temporarily deprive a parent of custody without parental consent or a court order." Hollingsworth, 110 F.3d at 739. See also Jordan, 15 F.3d at 343 (parents can be deprived of custody of their children without prior process "where emergency action is necessary to avert imminent harm to a child"); Weller, 901 F.2d at 393 ("Due process does not mandate a prior hearing where emergency action may be needed to protect a child."); Doe v. Hennepin County, 858 F.2d 1325, 1329 (8th Cir. 1988) (the state may

intervene on behalf of "abused children" without prior notice); Robison, 821 F.2d at 921 ("officials may temporarily deprive a parent of custody in 'emergency' circumstances"); Lossman, 707 F.2d at 291 ("When a child's safety is threatened, that is justification enough for action first and hearing afterwards."); Duchesne, 566 F.2d at 826 (child can be removed without prior process in "extraordinary situations").

It is not clear whether the facts in this case justified Oscar's removal without prior process. In each of the cases cited above where an emergency removal was found to be justified, there was specific evidence of an imminent threat of severe neglect or physical abuse. See Jordan, 15 F.3d at 336 (neglect); Welter, 901 F.2d at 391 n.7 (physical abuse); Doe, 858 F.2d at 1326 (sexual abuse); Robison, 821 F.2d at 916 (sexual abuse); Lossman, 707 F.2d at 289 (physical abuse and death threats); Duchesne, 566 F.2d at 822 (neglect). By contrast, in Hollingsworth, where there were merely general allegations of "abuse, injury, molestation, and harassment" but no concrete evidence of an "immediate threat," the removal without prior process was found to be unjustified. See Hollingsworth, 110 F.3d at 740. In this case, plaintiff was accused of kidnaping his son, a serious offense that arguably involves an inherent risk of further flight. It is unclear, however, whether the bare allegation of parental kidnaping is serious enough to justify emergency action to remove a child from his parent's custody without prior process. I need not resolve this issue because plaintiff was also denied a prompt, state-initiated postdeprivation hearing.

Even when an imminent threat of harm justifies removing a child from his parent's custody without prior process, there must be a prompt, state-initiated postdeprivation hearing to ratify the removal.[25] See

---

[25] In Egervary II, 491 F. Supp. 2d at 502-04,1 discussed at length the standard for deciding whether a postdeprivation hearing is sufficiently prompt to satisfy due process and the rationale for why a postdeprivation hearing must be initiated by the state.

Jordan, 15 F.3d at 343 ("[T]he requirements of due process may be delayed where emergency action is necessary to avert imminent harm to a child, provided that post-deprivation process to ratify the emergency action is promptly accorded."); Weller, 901 F.2d at 396 ("[E]ven if it is constitutionally permissible to temporarily deprive a parent of the custody of a child in an emergency, the state has the burden to initiate prompt judicial proceedings to ratify its emergency action."); Hennepin County, 858 F.2d at 1329 ("[T]he state may intervene on behalf of abused children . . . if the state provides an adequate postdeprivation hearing."); Lossman, 707 F.2d at 291 ("[W]here the state has a procedure for a prompt, adversary postdeprivation hearing in a child custody matter and the hearing is held and establishes that the state officers acted prudently in removing the child from the parent's custody without a prior hearing, that finding extinguishes a claim that the failure to hold a predeprivation hearing was a denial of due process."); Duchesne, 566 F.2d at 826 ("[I]n those 'extraordinary situations' where deprivation of a protected interest is permitted without prior process, the constitutional requirements of notice and an opportunity to be heard are not eliminated, but merely postponed.").

The federal defendants have not attempted to argue that plaintiff received either a prior hearing or a prompt, state-initiated postdeprivation hearing.[26] I therefore conclude that plaintiffs due process rights were violated and the federal defendants can be held liable

---

[26] In Egervary II, I considered and rejected the attorney defendants' argument that Egervary's motion for reconsideration filed before judge Nealon and the later custody proceedings in Hungary satisfied the requirement of a prompt, state-initiated post-deprivation hearing. See Egervary II, 491 F. Supp. 2d at 502-04.

for that violation unless there was no clearly established right at the time of the violation.[27]

---

[27] Although it is not necessary to show actual prejudice in order to make a due process claim, I note that plaintiff had potentially compelling arguments that may have changed the outcome of the ICARA proceedings if he had been afforded an opportunity to be heard. As I explained in Egervary II:

> Mr. Egervary had compelling, though not necessarily dispositive, arguments that could have been presented if he had been afforded notice and opportunity to be heard.
>
> First, Mr. Egervary maintains that Ms. Kovacs took Oscar out of this country under false pretenses and then refused to return him. See generally Egervary Supplemental Aff. ¶2. If these allegations are true, then Ms. Kovacs likely violated the Hague Convention by unlawfully retaining Oscar outside of the country of his habitual residence.
>
> Second, Mr. Egervary could have argued that the Hague Convention did not apply to Ms. Kovacs' claim because Hungary was not Oscar's habitual residence. Under ICARA, Ms. Kovacs had the burden of proving by a preponderance of evidence that Hungary was Oscar's habitual residence. See 42 U.S.C. § 11602(e). In Feder v. Evans-Feder, 63 F.3d 217, 224 (3d Cir. 1995), the Court of Appeals defined "habitual residence" as "the place where [the child] has been physically present for an amount of time sufficient for acclimatization and which has a 'degree of settled purpose' from the child's perspective." The "shared intentions" of both the parents are relevant to this inquiry. Id. The Feder Court also specifically criticized a district court decision that found Germany was a child's habitual residence after "what began as a voluntary visit" to that nation turned into a "coerced residence." Id. at 224-25, discussing In re Appliation of Ponath, 829 F. Supp. 363 (D.Utah 1983). Consistent with Feder, Mr. Egervary could have argued that Oscar never experienced a degree of settled purpose in Hungary because he lived there for such a short time and was frequently moved around the country because of his mother's attempt to hide the child from his father. In addition, Oscar's parents never had a shared

2. Clearly Established Right

The federal defendants are entitled to qualified immunity if they did not violate a "clearly established" right "of which a reasonable person would have known." Harlow, 457 U.S. at 818. The "contours" of the asserted right "must be sufficiently clear that a reasonable official would understand that what he is doing violates that right." Anderson v. Creighton, 483 U.S. 635, 640 (1987). "Some factual correspondence" to precedent is necessary, but "it is not necessary that there have been a previous precedent directly in point." Good v. Dauphin County Soc. Servs. for Children and Youth, 891 F.2d 1087, 1092 (3d Cir. 1989). "Thus, government officials are not barred from the protection of qualified immunity if they fail to predict

---

intention of residing in Hungary. Oscar was in Hungary only because his mother took him there, and she may have taken him there under false pretenses. Also relevant to this inquiry is the fact that Oscar is a United States citizen and at that point had spent the overwhelming majority of his life here.

Finally, even if the court rejected these arguments, Mr. Egervary would have had the opportunity to prove by clear and convincing evidence that Oscar's return would expose the child to "physical or psychological harm or otherwise place the child in an intolerable situation." See 42 U.S.C. § 11603(e)(2)(A); Hague Convention, Article 13. Specifically, Mr. Egervary could have developed the evidence that when he found his son in Hungary in December 1993 the boy "appeared undernourished" and wore "dirty and ragged" clothing. See Egervary Aff. ¶ 9.

The Court makes no finding as to whether Mr. Egervary would have prevailed on any of these arguments. Such a finding would not be possible without a full evidentiary hearing and is likely irrelevant to this case. It is nonetheless clear that plaintiff was deprived of any opportunity to present these arguments.

See Egervary II, 80 F. Supp. 2d at 500-01.

fluctuations in legal debates. They will not, however, be granted immunity if they fail to make obvious inferences from a generally established right, to its application in particular situations." Doe v. Delie, 257 F.3d 309, 331 (3d Cir. 2001) (Nygaard, J., concurring in part and dissenting in part). "In sum, an official will not be liable for allegedly unlawful conduct so long as his actions are objectively reasonable under current federal law." Gruenke v. Seip, 225 F.3d 290, 299 (3d Cir. 2000).

a. Federal Law as of May 1994

I conclude that plaintiffs right to due process was clearly established at the time of the alleged violation in May 1994 because there was a consensus among federal appellate courts that a parent is entitled to notice and opportunity to be heard in a situation like the present one. Of the numerous appellate court decisions cited in the previous section, only two, Hollingsworth v. Hill, 110F.3d733, 739 (10th Cir. 1997) and Jordan v. Jackson, 15 F.3d 333, 342 (4th Cir. 1994), were decided after the events in this case. Therefore, if the federal defendants were reasonably cognizant of federal constitutional law in May 1994, as the qualified immunity defense requires them to be, they should have been aware of the following.

In 1977, in Duchesne v. Sugarman, 566 F.2d 817, 821-22 (2d Cir. 1977), a mother brought a § 1983 claim on behalf of herself and her two minor children against four supervisory level municipal welfare employees and two private child care institutions. The mother alleged that the defendants had violated her due process rights by taking custody of her children without notice or opportunity to be heard. Id. at 824. The court concluded that the initial taking of the children was lawful because there was an imminent threat of neglect, the mother having been confined to a

psychiatric hospital. Id. at 825-26. It also held that defendants violated the mother's due process rights because there was no prompt, state-initiated postdeprivation hearing. Id. at 828. The state defendants raised the defense of qualified immunity, but the court remanded the case so that the district court could address the issue initially. Id. at 289-30.

In 1983, in Lossman v. Pekarske, 707 F.2d 288, 289 (7th Cir. 1983), a father brought a § 1983 claim on behalf of himself and his three minor children against county welfare and law-enforcement officers. The father alleged that the defendants had violated his due process rights by taking custody of his children without notice or opportunity to be heard. Id. at 289-90. The court concluded that the father had an fundamental liberty interest in the custody of his children and, therefore, they could not be removed from his custody without notice or opportunity to be heard. Id. at 290-91. It found, however, that the father had received due process in the form of a prompt, state-initiated postdeprivation hearing. Id. at 291-92. It therefore affirmed the district court's grant of summary judgment in favor of the defendants. Id. at 292.

In 1985, in Hooks v. Hooks, 771 F.2d 935, 937-38 (6th Cir. 1985), a mother brought a § 1983 claim against her former husband, his parents, two of his friends, officers and employees of a county sheriffs department, and an employee of the state Department of Human Services. The mother alleged that the defendants had violated her due process rights by taking custody of her two minor children without notice or opportunity to be heard. Id. at 938. The court concluded that the mother had stated a claim for violation of her due process rights, at least in part because the children had been removed from her custody and immediately taken to another state, "effectively

eliminating the opportunity for plaintiff to receive a post-deprivation hearing." Id. at 942. The court also discussed the extent to which co-conspirators could be held liable to the mother:

> Express agreement among all the conspirators is not necessary to find the existence of a civil conspiracy. Each conspirator need not have known all of the details of the illegal plan or all of the participants involved. All that must be shown is that there was a single plan, that the alleged coconspirator shared in the general conspiratorial objective, and that an overt act was committed in furtherance of the conspiracy that caused injury to the complainant.

Id. at 944. On this basis, the court found that the mother could not maintain a claim against her ex-husband's friends and parents because they were not alleged to have had knowledge of the conspiracy. Id. However, the court allowed the case to continue as to the remaining defendants. Id.

In 1987, in Robison v. Via, 821 F.2d 913. 915 (2d Cir. 1987), a mother brought a § 1983 claim against a state trooper and an assistant state's attorney. The mother alleged that the defendants had violated her due process rights by taking custody of her two minor children without notice or opportunity to be heard. Id. at 917. In analyzing the defendants' qualified immunity defense, the court stated the following:

> To be sure, in 1981, when the Robison children were taken into custody, it was clearly established that a parent's interest in the custody of his or her children was a constitutionally protected liberty of which he or she could not be deprived without due process, which would generally require a predeprivation hearing . . . However, it was, and remains, equally well established that officials may temporarily deprive a parent of custody in emergency circumstances without parental custody or a prior court order.

Id. at 921. The court went on to conclude that due process had been satisfied because there were credible allegations of sexual abuse that justified emergency removal of the child and there was a prompt, state-initiated postdeprivation hearing the next day. Id. at 922.

In 1990, in Weller v. Dep't. of Soc. Servs., 901 F.2d 387, 389 (4th Cir. 1990), a father brought a § 1983 claim against twenty-five defendants, including "agencies of Maryland, employees of the State of Maryland and the City of Baltimore, and his ex-wife and mother-in-law." The father alleged that the defendants had violated his due process rights by taking custody of his minor son without notice or opportunity to be heard. Id. at 393. The court held that "a parent is entitled to a hearing initiated by the State before he may be deprived of the custody of his child, and in an emergency a prompt hearing may ratify the state action." Id. at 398. It also expressed "additional concern" because the defendants had immediately taken the son to a different jurisdiction, "thereby reducing the possibility of a post-deprivation hearing." Id. at 396. The court acknowledged, however, that the defendants could assert qualified immunity and therefore remanded the case to the district court to determine whether the right had been clearly established at the time of the alleged deprivation. Id. at 398.

These precedents establish more than just the "contours" of the right that was allegedly violated; they are a well-marked roadmap.[28] All of the cases agree that a parent has a fundamental liberty interest in the custody of his or her child. All of the cases agree that that interest cannot be infringed upon without either prior process or, in the case of an emergency, a prompt, state-initiated postdeprivation hearing. Two of the cases, Duchesne and Weller. implicitly illustrate that liability for such an unconstitutional deprivation can extend further than the individual who physically takes custody of the child, and a third case, Hooks, explicitly describes the limits of conspiratorial liability for such a deprivation. Two of the cases, Duchesne and Weller. declared that the asserted right exists but remanded to the district court to determine whether it had been clearly established at the times of the alleged violations. A third case, Robison. explicitly stated that the right to due process in such situations had been clearly established as of 1981. See Robison, 821 F.2d at 921. Two of the cases, Hooks and Weller, noted that the immediate removal of the children to another jurisdiction had effectively eliminated the possibility of a postdeprivation hearing.

The only distinguishing point is that these precedents arose out of the conduct of state actors acting pursuant to state law, while this case arises out of the

---

[28] In addition to these appellate decisions, a number of district courts and state courts have arrived at similar conclusions in decisions that predate the events in this case. See, e.g. Rubin v. Smith. 817 F. Supp. 987 (D.N.H. 1993) (mother stated cause of action under § 1983 for a procedural due process violation where her daughter was taken from her custody after a temporary custody hearing in another state of which she was given no notice or opportunity to be heard); Roe v. Borup. 500 F. Supp. 127, 130 (E.D. Wis. 1980) ("Deprivation of child custody without a court hearing has been held to state a cause of action under section 1983 for a procedural due process violation."); Olson v. Priest. 564 P.2d 122, 123 (Colo. 1977) (granting of ex parte motion temporarily changing custody of child from mother to father violated mother's due process rights).

conduct of federal agents acting pursuant to an international treaty and the federal law that implements it. Extending these precedents to this situation, however, is not a "fluctuation in legal debate" that the federal defendants could be forgiven for failing to predict. See Doe, 257 F.2d at 331. Rather, applying the Due Process Clause to the actions of State Department employees is an "obvious inference from a generally established right." Id.

b. Violations of ICARA, State Law, and Federal Regulations

The preceding analysis is a sufficient and independent rationale for finding that the federal defendants are alleged to have violated a clearly established right. There are, however, additional reasons that may support this finding; namely, the federal defendants' alleged conduct also likely violated ICARA, state law, and federal regulations. Before I discuss these violations, however, I will explain why they may be relevant to the qualified immunity analysis.

Doe v. Delie is the Court of Appeals' most recent decision addressing the qualified immunity defense. In Doe, a former inmate of the Pennsylvania Department of Corrections claimed that prison officials had violated his constitutional right to medical privacy by allowing others to learn that he was HIV-positive. See Doe, 257 F.3d at 311. The panel ultimately affirmed the dismissal of the claim, but it was divided. Judge Garth was unwilling to declare that there is a constitutional right to medical privacy in prison. Id. at 323. Judge Nygaard believed that there is right to medical privacy in prison and that the right was clearly established at the time of the alleged violation. Id. at 330. Judge Roth was of the view that there is a right to medical privacy in prison but the right was not clearly established at the time of the alleged violation. Id. at 311.

There was also a difference of opinion as to whether a concurrent violation of state law is relevant to the qualified immunity inquiry. Judge Roth found that such evidence is not relevant because "[t]he Supreme Court has held that officials do not forfeit qualified immunity from suit for violation of a federal constitutional right because they failed to comply with a clear state statute." Id. at 318. Judge Nygaard disagreed. He argued that an overlapping state law should "raise [an] official's awareness that a parallel federal right may exist" and therefore is relevant to the qualified immunity inquiry. Id. at 334. Judge Garth did not reach the issue.

It is not my function to determine whether Judge Roth's or Judge Nygaard's view is correct. Cognizant of the disagreement, however, I feel obliged to discuss plaintiffs contention that the federal defendants also violated ICARA, state law, and federal regulations because the Court of Appeals may ultimately find this contention relevant to the qualified immunity analysis.

First, ICARA provides that notice "be given in accordance with the applicable law governing notice in interstate child custody proceedings." See 42 U.S.C. § 11603(c). Courts interpreting this provision have found the "applicable law" to be the Parental Kidnaping Prevention Act, 28 U.S.C. § 1738A ("PKPA"), and the Uniform Child Custody Jurisdiction Act, 23 Pa.C.S.A. § 5341, et seq. ("UCCJA"). See Brooke v. Willis, 907 F. Supp. 57, 60 (S.D.N.Y. 1995); Klam v. Klam, 797 F. Supp. 202, 205 (E.D.N.Y. 1992). Both PKPA and UCCJA provide for "reasonable notice and opportunity to be heard." See 28 U.S.C. § 1738A(e); 23 Pa.C.S.A. § 5345. This generally means "a plenary hearing at which both sides are heard." Klam, 797 F. Supp. at 205.

Klam is instructive. In Klam, a German father alleged that his ex-wife was unlawfully retaining their

children in New York and that the children should be returned to Germany pursuant to the Hague Convention and ICARA. To that end, he filed an ICARA petition asking that his children be taken into protective custody before the mother was notified of the ICARA proceedings. Id. at 203. In support of this request, the petition made a series of conclusory assertions, including the claim that the children were being "wrongfully detained" from the nation of their "habitual residence" and that the children would be "carried out of the jurisdiction" and "suffer irreparable injury" unless the petition was granted. Id. at 204. The court was confronted with the issue of whether the petition could be granted ex parte based only on those assertions. Id. at 206.

The court concluded that ex parte relief would violate the procedural protections of ICARA and gave two rationales for this conclusion. First, the court looked to a series of cases holding that ex parte relief is inappropriate under PKPA and UCCJA absent "a showing of extraordinary circumstances." Id. Second, the court was hesitant to rely on the unsubstantiated allegations contained in the petition. Id. It therefore denied the ex parte request for interim relief, but stated that it would allow the father to proceed after the mother had been served. Id. at 207 n.5.

The petition submitted to Judge Nealon was remarkably similar to the petition rejected by the court in Klam. For example, it alleged that plaintiffs removal of his son from Hungary in December 1993 was a "wrongful removal" from the child's "habitual residence" within the meaning of the Hague Convention and ICARA. See ICARA Petition of Aniko Kovacs (May 13, 1994) ¶¶2, 5 and 6. The petition also alleged that Egervary would "upon being informed of these proceedings . . . further abduct and secrete the child." Id. ¶12. However, Kovacs' petition also went a significant step further than the Klam petition. The petition asked that Oscar be turned over to Rooney immediately and

returned to Kovacs, rather than being held pending final resolution of the ICARA petition. Id. ¶13. The petition at issue in this case was, therefore, a more egregious violation of plaintiff s rights than the petition involved in Klam. I therefore conclude that the federal defendants' alleged conduct violated the ICARA notice provision.

Second, ICARA provides that a child cannot be "removed from a person having physical control of the child unless the applicable requirements of State law are satisfied." See 42 U.S.C. § 11604(b). The notice provision of the Pennsylvania version of the UCCJA, 23 Pa.C.S.A. § 5345, states that: "Before making a decree under this subchapter, reasonable notice and opportunity to be heard shall be given to the contestants, any parent whose parental rights have not been previously terminated and any person who has physical custody of the child." The Klam analysis above is sufficient to show that the federal defendants' alleged conduct also violated this state law.

Finally, there also is evidence from which it could be concluded that the federal defendants violated the State Department's regulations governing the Hague Convention. Those regulations provide that: "The U.S. Central Authority [i.e., the Bureau of Consular Affairs where the federal defendants worked] is prohibited from acting as an agent or attorney or in any fiduciary capacity in legal proceedings arising under the Convention." See 22 C.F.R. § 94.4(a). However, the U.S. Central authority "shall . . . [a]ssist applicants in securing information useful for choosing or obtaining legal representation, for example, by providing a directory of lawyer referral services, or pro bono listing published by legal professional organizations, or the name and address of the state attorney general or prosecuting attorney who has expressed a willingness to represent parents in this type of case and who is employed under state law to intervene on the applicant's behalf." See 22 C.F.R. § 94.6(d).

The federal defendants have repeatedly cited these regulations as evidence that they could not have engaged in any conduct that violated plaintiffs due process rights. See, e.g. Federal Defendants' Br. (August 7, 1996) at 11; Federal Defendants' Br. (May 11, 2001) at 26-27; Federal Defendants' Reply Br. (July 9, 2001) at 25.[29] It is clear, however, that the federal defendants' conduct - even the limited account of their conduct that has been set forth in their briefs - exceeded what they were authorized to do under the regulations. In their briefs, the federal defendants acknowledge that they: 1) contacted Rooney to ask him to represent Kovacs; and 2) sent Rooney written materials that would assist him in drafting the ICARA petition. See Federal Defendants' Br. (July 9, 2001) at 2-7 ("Statement of Undisputed Facts"). Section 94.6(d) does not authorize the State Department to retain an attorney on behalf of a petitioner or to give substantive assistance to an attorney. Rather, it permits assistance in "securing information useful for choosing or obtaining legal representation." When the federal defendants - by their own admission - helped Kovacs to find an attorney and then provided that attorney with written information to assist him in drafting the petition the federal defendants exceeded their authority under § 94.6(d) and became an "agent" of Kovacs, which is prohibited under § 94.4(a).

To reiterate, the federal case law previously discussed is, in my view, more than sufficient to establish that the federal defendants violated plaintiffs clearly established right to notice and opportunity to be heard. However, if the Court of Appeals should adopt Judge Nygaard's Doe opinion, there also is ample evidence that federal defendants violated ICARA, state law, and State Department regulations.

---

[29] I note that each time the federal defendants have quoted § 94.6(d) they omitted the phrase "and who is employed under state law to intervene on the applicant's behalf," a phrase that is difficult to reconcile with the fact that Rooney, Burke, and Nallin were private attorneys who were not "employed under state law."

3. The Federal Defendants' Reply Arguments

All of the federal appellate decisions discussed in my analysis of the qualified immunity issue were also discussed at length in Egervary II. See Egervary II, 491 F. Supp. 2d at 497-504. When I denied the federal defendants' motion for reconsideration of my order allowing plaintiff to file an amended complaint, I specifically called that discussion to their attention and stated my belief that the "wealth of authorities" cited therein would be probative of the qualified immunity decision. See Order (March 23, 2001) at 3. Since that time, the federal defendants have filed 105 pages of briefs on the motion to dismiss and motion for summary judgment, yet they have never cited, discussed, or attempted to distinguish any of those cases.

Instead, they have argued for qualified immunity by mischaracterizing the conduct they are alleged to have engaged in and the right they are alleged to have violated. For example, they argue that:

- "Plaintiffs claim against the Federal Defendants boils down to the contention that they offered legal advice that prompted the plaintiffs former wife, a litigant in court proceedings, to seek and obtain relief from Judge Nealon that violated plaintiffs due process rights under the Fifth Amendment." See Federal Defendants' Br. (May 11, 2001) at 25.

- "Plaintiffs claim is limited to the allegation that the Federal Defendants offered inaccurate legal advice to counsel for the plaintiffs former wife concerning the type of relief she, as a litigant, could request from the court." Id. at 26.

- "[T]he Federal Defendants, neither of whom was a lawyer, allegedly gave this legal advice to defendant Rooney, who was a lawyer and who represented the plaintiffs wife in all court proceedings ... it is inherently illogical to suggest that lay persons should be held responsible for providing allegedly inaccurate legal advice to a lawyer ..." Id. at 27-28. "[T]here plainly was no 'clearly established' law that defendants Young and Schuler, neither of whom are lawyers, could be held responsible for violating plaintiff Egervary's constitutional rights for supposedly advising defendant Rooney ..." Id. at 30.

- "In this case, defendants Young and Schuler may not be held responsible for any of the actions by defendant Rooney in seeking an order from Judge Nealon for the seizure of the plaintiffs son and then executing the Court's order, merely because the Federal Defendants supposedly advised him that he might be able to seek such an order." Id. at 31. "[P]laintiff completely fails to address the Federal Defendants' argument that in May, 1994 there was no 'clearly established' law that they could be liable to the plaintiff for a violation of his due process rights under the circumstances of this case, where they allegedly offered advice to the attorney for plaintiffs former wife concerning the type of relief which she could seek in court." See Federal Defendants' Reply Br. (July 9, 2001) at 22.

- "Plaintiff. . . does not offer a single case or any other legal authority to support his claim that the Federal Defendants, neither of whom is a lawyer, may be held liable for allegedly offering inaccurate legal advice to the attorney for a third party ..." Id. at 24.

Assuming arguendo that plaintiffs claim were "limited to the allegation that the Federal Defendants offered inaccurate legal advice," it is unclear whether the federal defendants could be held liable. It is clear that the qualified immunity defense does not absolve the federal defendants of liability simply because they are not lawyers (as they seem to imply in the passages quoted above). Rather, the qualified immunity defense is predicated on the concept that competent government officials will have a reasonable working knowledge of federal constitutional law. See Malley v. Briggs, 475 U.S. 335, 341 (1986).

It is clear, however, that this case is about more than just offering inaccurate legal advice. Plaintiff alleges, and based on the current record a reasonable jury could conclude, that the federal defendants did the following:

- In violation of State Department regulations, the federal defendants retained a private attorney on behalf Aniko Kovacs. See supra Part III-D- 2-b;

- The federal defendants conspired with, gave substantial assistance or encouragement to, and/or ordered or induced Rooney to present a petition to Judge Nealon that made false representations of fact and requested removal of the plaintiffs child from his custody without notice or opportunity to be heard. See infra Part III-E;

- The federal defendants contacted Judge Nealon's chambers on the morning that the ICARA petition was filed to alert the Court that Rooney would be presenting the petition that day. See Rooney Dep. at 120-21. See also infra Part III-E-3-b;

- In response to an inquiry from Judge Nealon, the federal defendants communicated through Rooney that the "official State Department position" was that the child could be lawfully removed from his father's custody and returned to Hungary without a hearing. See Rooney Dep. at 115-16, 131-32. See also Nealon Dep. at 16-20, 22-24, 26-28, 139-40;

- The federal defendants arranged for a passport waiver so that the child could immediately be returned to Hungary, effectively eliminating the possibility of a postdeprivation hearing. See Rooney Dep. at 165-66; Mannicci Dep. at 19, 22-23. See also infra Part III-E-3-f.

Plaintiffs claim, therefore, is not "limited to the allegation that the Federal Defendants offered inaccurate legal advice."

E. Personal Involvement

Finally, the federal defendants move for summary judgment on the grounds that there is insufficient evidence of their personal involvement in the alleged deprivation of plaintiff s due process rights. I disagree.

1. The Summary Judgment Standard

Rule 56 empowers a court to grant summary judgment if "there is no genuine issue as to any material fact" and "the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c). Initially, the moving party must state the basis for its motion and identify those portions of the record which it believes indicate the absence of any genuine issue of material fact. See Celotex Corp. v. Catrett, 477 U.S. 317, 323 (1986). When the moving party does not bear the burden of persuasion at trial, it may properly support its motion merely by showing that there is an absence of evidence to support the non-moving party's case. Id. at 325.

In response to a properly supported motion for summary judgment, the non-moving party must point to specific facts demonstrating that a genuine issue exists for trial. See Fed. R. Civ. P. 56(e). It may not rest upon unsupported allegations or denials. See Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986). A "mere scintilla of evidence" supporting the non-moving party's position is insufficient to create a genuine issue of material fact; there must be sufficient evidence from which a jury could reasonably find for the non-moving party. Id. at 252. "Credibility determinations, the weighing of evidence, and the drawing of legitimate inferences from the facts" should be left to the jury. Id. at 255. All evidence must be viewed in the light most favorable to the non-moving party. Id.

I note that the federal defendants' arguments in support of their motion misapply the summary judgment standard in a number of ways. First, although this is their motion for summary judgment Young and Schuler have not submitted affidavits giving their account of the events in this case.[30] In their briefs, however, they make factual claims about their conduct. For example, they claim that the

---

30 Their depositions have yet to be taken.

passport waiver was granted by the duty officer in the State Department's Passport Services office and that they had no involvement in issuing the waiver. See Federal Defendants' Br. (August 17, 2001) at 16-17. There is no evidence in the record to establish those facts, and, as I will explain in greater detail below, the record supports the inference that Young had some involvement in obtaining the waiver. The federal defendants' unsworn denial of that fact cannot affect my analysis.

Second, the federal defendants have at times attempted to rebut damaging testimony by citing other testimony that, in their view, explains away the damaging testimony. For the purposes of a summary judgment motion, however, I must assume that a jury might give no weight to the explanatory testimony. Therefore, even if I find the explanatory testimony to be reasonable I must find that an issue of fact exists on that point.

2. The Legal Standard for Personal Involvement in a Constitutional Tort

The federal defendants begin their summary judgment argument by claiming that plaintiff "has never coherently articulated his theory of liability." See Federal Defendants' Br. (August 17,2001). I disagree.

Plaintiff has discussed the legal standard for personal involvement in a constitutional tort. See Plaintiffs Br. (August 3, 2001) at 4-5. Specifically, he relies upon Rode v. Dellarciprete, 845 F.2d 1195 (3d Cir. 1988), and Robinson v. City of Pittsburgh, 120 F.3d 1286, 1294 (3d Cir. 1997). In Rode, the Court of Appeals held that "[a] defendant in a civil rights action must have personal involvement in the alleged wrongs." See Rode, 845 F.2d at 1207. The Robinson Court later discussed the Rode requirement in situations where a government employee has supervisory authority over the person who commits the constitutional tort. See

Robinson, 120 F.3d at 1294. The Robinson Court also stated in a footnote that when the issue arises in other situations, courts should be guided by the Restatement (Second) of Torts §§ 876 and 877(a). Id. at 1294 n.6.

Section 876 states:

PERSONS ACTING IN CONCERT

For harm resulting to a third person from the tortious conduct of another, one is subject to liability if he

(a) does a tortious act in concert with the other or pursuant to a common design with him, or

(b) knows that the other's conduct constitutes a breach of duty and gives substantial assistance or encouragement to the other so to conduct himself; or

(c) gives substantial assistance to the other in accomplishing a tortious result and his own conduct, separately considered, constitutes a breach of duty to the third person.

Section 877(a) states:

> DIRECTING OR PERMITTING CONDUCT OF ANOTHER
>
> For harm resulting to a third person from the tortious conduct of another, one is subject to liability if he
>
> (a) orders or induces the conduct, if he knows or should know of circumstances that would make the conduct tortious if it were his own . . .

On this basis, plaintiff has argued that the federal defendants potentially could be held liable under any of these standards (conspiring with, giving substantial assistance or encouragement to, and/or ordering or inducing the conduct). In my view, plaintiffs discussion is coherent and supported by Rode and Robinson. The federal defendants, however, have not cited any authority to guide my consideration of their alleged personal involvement and have argued for at least three different standards in their briefs.[31]

For the purposes of this motion, I need not decide which provision of the Restatement applies to plaintiffs claim. The federal defendants' analysis of the record consistently argues that there is no evidence that they knew what

---

31 In their initial summary judgment brief, they argue, in effect, that the proper standard is whether they knew what Rooney was doing. See, e.g. Federal Defendants' Br. (July 9, 2001) at 2 (arguing that Young and Schuler were never "informed" by Rooney that he intended to seek an ex parte order). In their summary judgment reply brief, the federal defendants first argue that the proper standard is whether they "authorized or encouraged" Rooney. See Federal Defendants' Br. (August 17, 2001) at 25 n.6. Later in that brief, however, they argue that the proper standard is whether they exercised "control" over Rooney. Id. at 27.

Rooney was doing, and knowledge of the other party's action is arguably a prerequisite to liability under any of the provisions of Restatement §§ 876 and 877(a).[32] I find, however, that there is ample evidence that the federal defendants' knew of Rooney's actions. Moreover, viewing the record in the light most favorable to plaintiff a jury could reasonably conclude that the federal defendants conspired with, gave substantial assistance or encouragement to, and/or ordered or induced Rooney's actions.

3. Evidence of Personal Involvement

a. The Rentention of and Assistance to Rooney and the Model Pleadings

The starting point for the federal defendants' analysis of the record is the model pleadings that Young sent Rooney. In numerous instances, each of which will be discussed in greater detail below, the federal defendants argue that they could not have known that Rooney was seeking an ex parte order because the model pleadings did not provide for ex parte proceedings. See, e.g. Federal Defendants' Br. (July 9, 2001) at 13 ("Rooney's purported assumption that defendant Schuler thought that defendant Rooney was seeking an ex parte order is not worthy of any consideration because it was inconsistent with the model pleadings pointed out to defendant Rooney by the State Department."). There are two problems with this argument.

First, this argument ignores the extensive contacts that Rooney had with Young and Schuler after he received the model pleadings. Rooney testified that he "had to rely on them [i.e., Young and Schuler] to help [him]" because he

---

32 I note, however, that comment a to Restatement § 877 states: "If he intends the result, it is immaterial that the tortious means used are not those originally contemplated, provided the defendant's order or inducement is one of the contributing factors."

"was not extremely well-versed on The Hague." See Rooney Dep. at 62. He therefore spoke to them "a bunch of times." Id. Burke confirmed that during the days when Rooney was receiving that help "they [i.e., Young and Schuler] seemed to be calling constantly ... I remember the phone calls was [sic] constantly coming in and it was the State Department. . . they were calling all the time it seemed like." See Burke Dep. at 26-27'. Similarly, on the day of the ex parte meeting, Rooney was "continuously in conversation" with the State Department. Id. at 71. Given this volume of phone calls after Rooney received the model pleadings, a reasonable jury could infer that the model pleadings were merely the starting point for the help Rooney received from the federal defendants.

Second, the federal defendants mischaracterize the contents of the model pleadings. They argue that the model pleadings "provided for full notice of all proceedings." See Federal Defendants' Br. (August 17, 2001) at 10. This is incorrect. The model pleadings in fact suggest an initial ex parte proceeding without notice to the alleged parent-kidnapper followed by seizure of the child and a prompt postdeprivation hearing with notice.

The model pleadings Young sent Rooney consisted of two parts. The first was a model ICARA petition. See Federal Defendants' Br. (July 9, 2001) at Exhibit G. The model petition contains two provisions that are relevant to the present discussion. The first is labeled "Notice of Hearing." It provides: "Pursuant to 42 USC 11603(c), Respondent shall be given notice pursuant to [state law]." The federal defendants' contention that the model pleadings provided for "full notice of all proceedings" apparently rests on this provision. However, as my previous discussion of 42 U.S.C. § 11603(c) showed, this statute merely provides for "reasonable notice and opportunity to be heard" and allows for the seizure of a child without prior notice in "extraordinary

circumstances." See supra Part III-D-2-b, discussing § 11603(c) and Klam. Therefore, read in isolation the "Notice of Hearing" provision of the model petition does not stand for the proposition that the alleged parent-kidnapper will be given "full notice of all proceedings."

The other relevant provision of the model petition also does not support the federal defendants' claim. The model petition also contains an optional provision labeled "Provisional Remedies." This provision states that the petitioner "believes that Respondent, upon being informed of these proceedings, will further abduct and secrete the child." See Federal Defendants' Br. (July 9, 2001) at Exhibit G. It goes on to state that because of this threat of further flight the petitioner is simultaneously presenting a "petition for warrant in lieu of habeas corpus" that provides for the immediate seizure of the child without prior notice to the alleged parent-kidnapper and placement of the child in protective custody "until a determination is made under this petition." Id. This provision reinforces the conclusion that the model petition does not provide for "full notice of all proceedings."

The second part of the model pleadings Young sent Rooney was a sample of the warrant referred to in the "Provisional Remedies" provision of the model petition. See Federal Defendants' Br. (July 9, 2001) at Exhibit H. The model warrant is essentially an order with three different options from which the judge can choose. It is directed to "any peace officer" within the state and begins by stating that the court believes the child in question is being illegally held and that there is reason to believe that the parent-kidnapper will carry the child out of the jurisdiction. Id. It then lists the options for seizing the child. The first option orders the child to be seized and brought before the court for an immediate hearing. Id. The second option orders the child to be seized and placed in a juvenile shelter until a hearing is "promptly" conducted. Id. The third option

orders the child to be seized and turned over to the Petitioner, who is ordered to "immediately" calendar a hearing and is prohibited from removing the child from the county. Id. The model warrant also provides the judge with the option of ordering the same officer who seizes the child to serve the alleged parent-kidnapper with a copy of the petition, implicitly for the first time. Id.

As was discussed above, the model petition provides for the possibility that some proceeding will occur before the alleged parent-kidnapper is given notice. The model warrant goes a step further. It provides three specific options for seizing the child before the alleged parent-kidnapper has been given notice. Read together, these model pleadings do not provide for "full notice of all proceedings." Rather, they suggest an initial ex parte proceeding without notice to the alleged parent-kidnapper followed by seizure of the child and a prompt postdeprivation hearing with notice.

b. The Phone Call to Judge Nealon's Chambers

On two different occasions, Rooney testified that someone from the State Department called Judge Nealon's chambers on May 13, 1994 to inform the Court that a Hague Convention petition was going to be presented that day.

In his interrogatories, Rooney was asked to "set forth the date, time and manner in which [the meeting with Judge Nealon on May 13, 1994] was arranged and the persons involved in making such arrangements." See Rooney Interrogatories (July 17, 1998) at 7(c). Rooney answered: "I believe the State Department advised Judge Nealon's chambers of the pending action. I do not recall any other specific details." See Rooney Amended Answers (undated) at 7(c).

Similarly, in his deposition the following exchange occurred:

Q: In your Answers to Interrogatories I believe you said, and I don't have them in front of me but I will get them if there's a question about this, I believe that you said that the State Department had contacted the court to arrange for you to appear before Judge Nealon.

A: I don't know if they called to arrange. They called to inform the court that a petition would be presented involving a Hague matter. I don't know who called, I don't know with whom they spoke; I just knew that by the time we got there the judge was aware or the judge's chambers was aware of someone coming in with a petition. I also think that we may have called, someone from my office may have called, to advise the judge that we were on our way to Scranton.

Q: What made you think that someone from the State Department had contacted chambers?

A: I may have recalled the secretary saying, Oh, yes, we got a call from the State Department saying that a petition was going to be brought in.

See Rooney Dep. at 120-21.

This evidence is potentially harmful to the federal defendants' claim that they had no personal involvement in the ICARA proceedings. It is difficult for them to argue that they did not know what Rooney was doing if they called Judge Nealon's chambers that day to inform the Court that Rooney was on his way with an ICARA petition. They therefore attempt to rebut Rooney's testimony with testimony from Judge Nealon and Burke.

The federal defendants argue that "Judge Nealon's testimony conclusively rebuts plaintiffs argument that there is a fact issue in this case as to whether the Federal Defendants somehow influenced Judge Nealon's decision by contacting the judge's chambers to schedule the ex parte hearing." See Federal Defendants' Br. (August 17, 2001) at 2. In support of that argument, they quote the following questions and answers from Judge Nealon's deposition:

> Q: Now, do you have any information that anyone from the State Department contacted anyone in your chambers about the possible filing of this petition by Mr. Rooney before it was actually filed?
>
> A: I have no information like that. See the procedure is when an emergency matter is filed with the clerk's office they - someone in the clerk's office may and usually does seek some information as to what it's about, and the reason for that is there may be a matter that a particular judge doesn't want to handle or that he may have a conflict.

> Q: Do you have any information that anyone from the State Department contacted the clerk's office about this matter prior to its being filed?
>
> A: No, I have not.

See Nealon Dep. at 86-87. Judge Nealon's testimony on this point does not "conclusively rebut" Rooney's testimony. Judge Nealon merely stated that he had no information regarding a call from the State Department prior to his meeting. That does not necessarily mean that his secretary did not receive such a call.[33]

The federal defendants also argue that Burke's testimony on this point "eliminated any confusion." See Federal Defendants' Br. (July 9, 2001) at 8 n.6. Burke testified as follows:

> Q: Did you, at any point before going to court, telephone the court to arrange for the matter to be presented to a judge?

---

[33] The federal defendants go on to argue that they never had any direct contact with Judge Nealon "that could conceivably have influenced him." See Federal Defendants' Br. (August 17, 2001) at 4. That statement appears to be true but is not relevant to plaintiffs claim. Plaintiff does not contend that there was any direct contact. He does contend, however, that there was indirect contact sufficient to establish that the federal defendants conspired with, gave substantial assistance and encouragement to, and/or ordered or induced Rooney. Moreover, Judge Nealon unequivocally stated: "If it weren't for the involvement of the State Department I would not have taken the action I did take." See Nealon Dep. at 140. Therefore, unless Rooney misrepresented the nature and extent of the federal defendants' involvement, their alleged indirect contact clearly did influence Judge Nealon.

> A: I think I talked to - I think I personally got the name of the law clerk from Attorney Nallin and then I don't know if I called him or if Fred called him as to scheduling of this or at least of an understanding of when we could go in to See Judge Nealon.

See Burke Dep. at 41.

There are two problems with the federal defendants' reliance on this testimony. First, there is not necessarily a conflict between Burke's and Rooney's testimony. Burke testified that he got the number from Nallin and gave it to Rooney but does not remember who actually called. Rooney testified that when they arrived for the hearing, the Judge's staff was expecting them. He possibly remembers the Judge's secretary saying that the State Department had called, but he admits that his office may have "also" called. See Rooney Dep. at 120-21. Notably, neither Rooney nor Burke remember placing the call themselves. A jury could reasonably conclude that there is no actual conflict in this testimony and that someone from the State Department placed the call.

Second, if there is an actual conflict between Rooney's and Burke's testimony, a reasonable jury could credit the former and ignore the latter (or vice-versa). For the purposes of a summary judgment motion, I must read the evidence in the light most favorable to plaintiff and assume that a jury would credit Rooney's testimony. The federal defendants' real objection to this testimony seems to be that Rooney does not have a vivid memory of what happened and equivocates in his testimony; however, any uncertainty in his testimony is a matter for impeachment before the jury.

I therefore conclude that there is a material issue of fact as to whether the federal defendants contacted Judge Nealon's chambers.[34]

c. The Federal Defendants' Ignorance of the "Fourth Option"

The parties agree that the petition and warrant Rooney presented to Judge Nealon differed from the model pleadings Young had sent him in one crucial respect. The model pleadings provide three options for an initial ex parte proceeding without notice to the alleged parent-kidnapper followed by seizure of the child and a prompt postdeprivation hearing with notice. See supra Part III-E-3-a. The fourth option added by Rooney eliminated the postdeprivation hearing. Specifically, it provided that Oscar would be "take[n] into protective custody . . . and delivered] to Petitioner's agent for immediate return to the physical custody of Petitioner."[35] See Federal Defendants' Br. (July 9, 2001) at Exhibit F.

The federal defendants initially claimed that Rooney "stated at his deposition that he did not recall even mentioning the fourth option to anyone at the State Department when he decided to add it to the proposed

---

34 In addition, I note that Rooney's testimony is arguably helpful to plaintiffs case even if he was wrong about who actually made the phone call. This testimony arguably shows Rooney's state of mind regarding the extent of the federal defendants' knowledge of his actions. He thought it was at least possible that the federal defendants called Judge Nealon's chambers the day of the meeting. Such a call would not have been possible if their personal involvement ended with the transmission of the model pleadings a few days before.

35 The fourth option was similar to the third option, in that both provided for Oscar to be taken from his father's custody and placed in his mother's custody. The third option, however, provided that Oscar could not be removed from Monroe County pending a hearing, while the fourth option eliminated the need for (or possibility of) a postdeprivation hearing by ordering the child's immediate return to Hungary.

order." See Federal Defendants' Br. (July 9, 2001) at 8. In support of this assertion, they cited, but did not quote, the following testimony:

> Q: Before that conversation with Mr. Schuler do you know whether Mr. Schuler was aware that you had added that paragraph to the standard form for a Warrant in Lieu of Writ of Habeas Corpus?
>
> A: I don't recall. I don't recall if I spoke to Ginny Young about it or if I spoke to Schuler about it.

See Rooney Dep. at 116. Even read on its own, without the benefit of the additional testimony I will quote below, this passage does not support the federal defendants' assertion that Rooney did not mention the immediate return option to "anyone" at the State Department. The common sense reading of Rooney's answer is that he spoke to either Young or Schuler about it but could not remember which it was.

In addition, the federal defendants did not refer to the following testimony, which appears the page before the passage the quoted above:

> Q: Did you discuss with Ms. Young or anyone else at the State Department the paragraph of the warrant in lieu of Writ of Habeas Corpus that you added to the form that you referred to earlier?
>
> A: I did the day the order was presented. I spoke to James Schuler about it. Id. at ¶14-15.

These two passages rebut the federal defendants' assertion that Rooney never mentioned the fourth option to Young and Schuler: Rooney testified that he was unsure which of them he had spoken to about the fourth option in the days before the ex parte hearing, but he was certain that he had spoken to Schuler about it on the day of the hearing.

In their reply brief, the federal defendants admit, at least in part, that they misread Rooney's testimony. See Federal Defendants' Br. (August 17, 2001) at 10 n.2. They now admit that Rooney told Schuler about the fourth option on the day of the meeting with Judge Nealon but do not acknowledge that Rooney may have informed Young or Schuler about it in the preceding days. Id.

They now argue that Schuler's knowledge of the fourth option was "clearly irrelevant under the circumstances" because Schuler did not know that Rooney's meeting with Judge Nealon was ex parte. Id. As was previously discussed, however, the model warrant that Young sent Rooney was designed for the express purpose of seizing the child before the alleged parent-kidnapper had notice. See supra Part III-E-3-a. The federal defendants concede that it is "reasonable" to assume that "Schuler would have been familiar with the model pleadings." See Federal Defendants' Br. (July 9, 2001) at 14. Therefore, the fact that Rooney was preceding ex parte was implicit when he told Schuler that he had added a fourth option to the model warrant.

d. The Federal Defendants' Ignorance of the Ex Parte Nature of the Meeting with Judge Nealon

The federal defendants next argue that the record "conclusively demonstrates" that they did not know that the proceedings before Judge Nealon were ex parte. See Federal Defendants' Br. (July 9, 2001) at 11. I disagree.

As I have previously noted, the federal defendants have not filed affidavits stating that they did not know that the proceedings were ex parte. Instead, they argue that that conclusion can be inferred from three facts: 1) during his phone call from Judge Nealon's chambers, Rooney did not specifically tell Schuler that the proceedings were ex parte; 2) the model pleadings that Young sent Rooney provided for "full notice of all proceedings"; and 3) ex parte proceedings are rare in ICARA cases.

The federal defendants rely on the following passage from Rooney's deposition:

> Q: Did you, during that conversation [from Judge Nealon's chambers], advise Mr. Schuler that no notice of this, the filing of this petition, had been given to Mr. Egervary?
>
> A: No, but I think that we would have assumed that that was the case simply because in most Hague matters notice is not given to someone who has been determined to be an abducting parent for fear that upon notice of something pending that there would be a flight with a child. It would have been highly irregular to give notice to a parent in this situation for fear that the child would then be taken someplace else.

See Rooney Dep. at 131-32.

This passage says what the federal defendants claim it says; namely, during the phone call from Judge Nealon's chambers Rooney did not specifically tell Schuler that the proceedings were ex parte. This fact, however, does not establish that Schuler did not know that the proceedings

were ex parte. In fact, Rooney states that he assumes Schuler knew they were. The federal defendants therefore argue that "Rooney's purported assumption that defendant Schuler thought that defendant Rooney was seeking an ex parte order is not worthy of consideration because it was inconsistent with the model pleadings pointed out to defendant Rooney by the State Department. . . there was no logical reason for defendant Schuler to have merely assumed that defendant Rooney was proceeding without notice to Mr. Egervary." See Federal Defendants' Br. (July 9, 2001) at 13.

As I have previously discussed, however, those model pleadings did not provide for "full notice of all proceedings." Cf Federal Defendants' Br. (August 17, 2001) at 10. They provided for an initial ex parte proceeding without notice to the alleged parent-kidnapper followed by seizure of the child and a prompt postdeprivation hearing with notice. See supra Part III-E-3-a. Therefore, there was a logical reason for Schuler to have assumed that Rooney was proceeding ex parte; namely, the model pleading suggested that an in initial ex parte proceeding was appropriate.

The federal defendants also argue that Rooney was wrong to assume that Schuler knew the proceedings were ex parte because ex parte proceedings are rare in ICARA cases:

> The ex parte process utilized by defendant Rooney was not normal or routine, as he apparently believed. This Court has already determined that the ex parte process violated the Due Process Clause of the Fifth Amendment, and the Court has even gone so far as to suggest that the process was so obviously flawed as to likely violate plaintiffs clearly established constitutional

> rights. See Order of March 23, 2001 at p.3. It can hardly be argued that defendant Schuler should have merely assumed under the circumstances that defendant Rooney was engaged in a clearly unlawful process because defendant Rooney failed to specify otherwise.

Id. at 13.

This argument is flawed for two reasons. First, the federal defendants misstate my earlier findings of why the proceedings were constitutionally deficient. I did not say that a defendant in an ICARA proceeding must invariably receive prior notice of the proceedings. To the contrary, I stated that such defendants are entitled to either prior process or a prompt, state-initiated postdeprivation hearing. Therefore, Rooney's statement that it is highly unusual to give prior notice to such defendants does not necessarily conflict with my earlier findings.[36]

Second, and more importantly, what I have written about the nature of the due process rights that were at stake is irrelevant to what Rooney and Schuler communicated to one another that day. Whether Rooney and Schuler thought that prior notice is highly irregular in such situations is a factual question that must be answered with reference to the record, not with reference to my earlier legal determinations.

---

[36] In addition, I note that the model pleadings do not necessarily conflict with my earlier findings. The model pleadings suggested an initial ex parte proceeding without notice to the alleged parent-kidnapper followed by seizure of the child and a prompt postdeprivation hearing with notice. This procedure is consistent with due process if there is an emergency situation sufficient to justify the initial removal of the child without notice, a condition that is probably satisfied in the case of a parental kidnapping if there is a bona fide threat of further flight.

What is relevant, therefore, is: 1) what the State Department's actual practice in such situations was prior to May 1994; and 2) the course of conduct between Rooney and Schuler that preceded that conversation.[37] Because Young and Schuler have not been deposed and I do not have their affidavits, the record is silent as to the State Department's prior practices in these situations. The record is replete, however, with evidence of the course of conduct between Rooney and the federal defendants. That course of conduct

---

[37] The federal defendants attempt to rebut this conclusion by arguing that: "The immunity test under the doctrine never involves delving into the subjective thought processes or beliefs of the [government official] at the time of the alleged unconstitutional action." See Federal Defendants' Br. (July 9, 2001) at 15. This conclusion follows, they argue, from the fact that qualified immunity depends upon the "objective legal reasonableness" of the government official's actions. Id. Therefore, they conclude, "Young and Schuler's subjective thoughts at the time of their alleged conduct are irrelevant" and qualified immunity must be judged solely based upon what Rooney "actually communicated" to Schuler in the conversation from Judge Nealon's chambers. Id. at 16. This argument is flawed for two reasons. First, assuming arguendo that Young and Schuler's subjective thoughts are irrelevant, there is no reason why the inquiry into what was "actually communicated" would end with the conversation from Judge Nealon's chambers. Rooney testified that he had spoken to the State Department "a bunch of times" in the days before, and Burke testified that Rooney had spoken to the State Department at least three other times on the day of the ex parte hearing. See Rooney Dep. at 62; Burke Dep. at 70-71.

Second, the two cases the federal defendants cite in support of their argument rebut the conclusion they draw. In Anderson v. Creighton, 483 U.S. 635, 641 (1987), the Court stated that "the determination whether it was objectively legally reasonable to conclude that a given search was supported by probably cause or exigent circumstances will often require examination of the information possessed by the searching officials." An examination of the "information possessed" by the officials is an examination of their subjective thoughts. Similarly, in Hunter v. Bryant, 502 U.S. 224, 288 (1991), the Court stated that the reasonableness of the arrest at issue in that case should have been judged according to "the facts and circumstances within [the officers'] knowledge" at the time of the arrest. That is also an inquiry into their subjective thoughts. Similarly, the question in this case, a question ultimately for a jury, is what Young and Schuler knew based upon the facts and circumstances, not whether Rooney uttered the right words.

included numerous phone conversations and the transmission to Rooney of model pleadings that suggested an initial ex parte proceeding without notice to the alleged parent-kidnapper followed by seizure of the child and a prompt postdeprivation hearing with notice. On this basis, a reasonable jury could conclude that Schuler knew the proceedings were ex parte.

Finally, Rooney is not the only person to have testified on this point. In Judge Nealon's deposition, counsel for the federal defendants read the portion of Rooney's deposition quoted above, and the following exchange occurred:

> Q: Did Mr. Rooney ever tell that he had not actually given notice to Mr. Schuler when he called him on the telephone in the break in the conference that you had that this was an ex parte hearing?
>
> A: Did he ever say that to me, is that what you're saying?
>
> Q: Yes.
>
> A: No.
>
> Q: And would it have been significant to you if you knew that Mr. Schuler, the representative from the State Department that Mr. Rooney had spoken to, did not know that it was an ex parte hearing?
>
> A: It would have been, but I don't know how that would be consistent with what I've told you. And that is unless Mr. Rooney isn't reporting properly.

> The query I presented to Mr. Rooney was to determine if it was the State Department's position, those with expertise in international law, that I should act immediately without notice and without a hearing and order that the custody of the child be turned over to the petitioner.

See Nealon Dep. at 129-30.

Although Judge Nealon was not a firsthand witness to the conversation between Rooney and Schuler, his testimony points out that the federal defendants' theory of that conversation is implausible. Judge Nealon repeatedly testified that he sent Rooney out to call the State Department in order to find out whether it was the Department's position that the child could be immediately returned without a hearing. See Nealon Dep. at 16-20, 22-24, 26-28, 139-40. The federal defendants implicitly argue not only that Rooney did not report the query properly, but also that Schuler believed that a federal judge had stopped a full-blown adversarial hearing in order to find whether, in the State Department's view, the judge could take any action at that hearing. In other words, as Judge Nealon hinted, the phone call only makes sense if Schuler understood that Egervary was not present. Perhaps Schuler will provide some other plausible account of that phone call when he is deposed, and perhaps a jury will ultimately accept that account. On this record, however, some other explanation cannot be assumed.

e. The Phone Calls after the Meeting with Judge Nealon

Burke testified that Rooney was "continuously in conversation" with the State Department on the day of the meeting with Judge Nealon:

Q: So, is it correct that on your way to the Newark Airport you stopped at the state police barracks?

A: Some barracks or some kind of - yes, to get directions, that's what is my recollection.

Q: Do you know whether Mr. Rooney spoke with anyone at the State Department at that time?

A: You know, he did. He did also in the U.S. Marshal's Office talk to someone from the State Department. And if memory serves me, at the courthouse that day we were continuously - he was continuously in conversation with them. So, that is true, it may be three times. And then if I remember, in the courthouse, in the Marshal's Office and then at some point when we were trying to - we were driving to Newark. All that stuff occurred, we were talking to them. I don't know what the substance of the conversations were, though.

See Burke Dep. at 70-71.

The federal defendants discuss these alleged phone calls for the first time in their reply brief. See Federal Defendants' Br. (July 17, 2001) at 15-16. They argue that: 1) Burke's testimony is inadmissible hearsay; and 2) the phone calls never happened.

Burke's testimony is not hearsay. Fed. R. Evid. 801(c) defines hearsay as "a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." Burke's

testimony is not being offered to prove the truth of what Rooney asserted in those phone calls. It is being offered to prove that Rooney made the phone calls.

The claim that the phone calls never happened also fails for the purposes of this motion. As I have previously noted, the federal defendants have not submitted affidavits denying that they spoke to Rooney at the times mentioned by Burke. Instead they argue that Rooney "denied" and "specifically testified" that he did not make those phone calls. See Federal Defendants' Br. (August 17, 2001) at 15. In support of that claim, they quote the following testimony:

> Q: What contact did you have with the State Department after you left the courthouse on May 13, 1994?
>
> A: I contacted them to tell them that the child had been returned. I know that they appreciated the efforts that I made to get the child back to his mother. I don't know how much more contact there was between then and the time that the motion for reconsideration was filed.

See Rooney Pep, at 175-76.

This is not a specific denial of Burke's testimony. Rooney seems to be referring to a phone call after he returned from Europe, not before he went, and he does not eliminate the possibility of other phone calls. He was never specifically questioned regarding Burke's claim that he was continuously in conversation with the State Department on May 13th. Moreover, if this was a specific denial of Burke's testimony, a jury could choose to accept Burke's testimony over Rooney's.

I therefore find that a jury could reasonably conclude that Rooney made phone calls to the federal defendants after the meeting with Judge Nealon and before his trip to Europe.

f. The Passport Waiver

Rooney testified that after Oscar had been turned over to him he instructed his associate, Lori Mannicci, to make arrangements for their trip to Europe. See Rooney Dep. at 156. Those arrangements included contacting the State Department to arrange for a passport waiver so that the child could be removed from the country immediately. Id. at 165-66. Mannicci testified that she could not remember anything about contacting the State Department to arrange for the waiver, including to whom she spoke. See Mannicci Dep. at 30-31. However, her handwritten notes from that afternoon include - on two separate pages - notations with Ginny Young's home telephone number. Id. at 19, 22-23 and Exhibits 9 and 10. Although there are many unanswered questions about how the passport waiver was obtained, in my view the presence of Young's home telephone number in Mannicci's notes from that day supports the inference that Young had some kind of involvement.

The federal defendants initially did not discuss the passport waiver, except to dismiss it as irrelevant to the case. See, e.g. Federal Defendants' Reply Br. (July 9, 2001) at 5-6 n.3 (arguing that the passport waiver did not have "anything of significance to do with the alleged deprivation of plaintiff s due process rights"). I disagree with this assessment. As I have stated previously, the immediate removal of the child from this country consummated the due process violation by effectively eliminating the possibility of a postdeprivation hearing. See Egervary II, 491 F. Supp. 2d at 502 n. 7. citing Welter, 901 F.2d at 396, and

Hooks, 771 F.2d at 942-43. Simply put, a jury could conclude that the passport waiver was an overt act taken in furtherance of the alleged conspiracy.

The federal defendants address the substance of the passport waiver evidence for the first time in their reply brief. See Federal Defendants' Br. (August 17, 2001) at 16-17. They now argue that the waiver was granted by the duty officer in the State Department's Passport Services office and that they had no involvement in issuing the waiver. Id. They claim, without any citation to the record or State Department regulations, that they "were not employed by Passport Services and could not themselves have granted the passport waiver." Id. at 17 n.3. For the purposes of a summary judgment motion, I cannot consider these unsworn assertions.

I therefore find that a jury could reasonably conclude that Young had some involvement in seeking and/or granting the passport waiver.

g. Schuler's Follow-Up Letter

The federal defendants also discuss Schuler's follow-up letter to Rooney for the first time in their reply brief. See Federal Defendants' Br. (August 17, 2001) at 16. They argue that the letter could not have "encouraged" Rooney's actions because it was sent a few weeks after he had returned from Europe. Id. That statement is literally true but does not address the real relevance of the Schuler letter to plaintiffs claim.

The federal defendants have suggested - though, again, have not provided any affidavits asserting - that Schuler's only contact with the Egervary case was the "minute or two" telephone conversation from Rooney in Judge Nealon's chambers on May 13, 1994. See, e.g. Federal Defendants' Br. (July 9, 2001) at 9, 12. Schuler's follow-up letter, however, shows far more familiarity with the matter than possibly could have been gleamed from that single

phone conversation, and, more importantly, shows Schuler's willingness to vouch for the facts, legal conclusions, and tactics Rooney used in the proceedings before Judge Nealon.

Schuler begins by stating that he will "briefly review the background of the case." See Schuler Ltr. (June 1, 1994) at 1. He then provides a six-paragraph factual narrative that is for all practical purposes identical to what Rooney had presented to Judge Nealon.[38] Id. at 1-2. He then opines on two of the key legal questions that were at issue in the ICARA proceedings. He asserts that Oscar was a habitual resident of Hungary and that Egervary's retrieval of the child was an "unlawful removal" under Article 3 of the Hague Convention. Id. at 2. He then states that: "Article 2 of the Convention asks that 'the most expeditious procedures available' be utilized in effecting implementation of Convention precepts." Id. Though the reason for this quotation is not explicit, it can reasonably be inferred that Schuler's emphasis on the "the most expeditious procedures available" was an allusion to Rooney's immediate return of the child without a hearing.[39] Finally, Schuler concludes by

---

[38] As I have previously explained, that factual narrative conflicts with the sworn testimony in this case in many respects. See supra note 8.

[39] The federal defendants argue: "Nor does it [i.e., the letter] provide even indirect evidence that defendant Schuler had favored the ex parte process followed by defendant Rooney. The letter makes no reference to the ex parte process and there is no evidence that defendant Schuler had any knowledge of the process when he sent the letter." See Federal Defendants' Br. (August 17, 2001) at 16. I disagree. As I have previously discussed, the federal defendants sent Rooney model pleadings that provide for an initial ex parte proceeding without notice followed by a postdeprivation hearing with notice. During the phone call from Judge Nealon's chambers, if not before, Rooney says he told Schuler that he had added a fourth option that eliminated the postdeprivation hearing. Given these facts, Schuler' reference to "the most expeditious procedures available" may well be a reference to the procedures Rooney followed.

thanking Rooney for his "prompt, humane and professional assistance" in handling the case. Id.

Rooney testified that he had sought the letter as "reassurance" because Egervary had filed a motion for reconsideration before Judge Nealon. See Rooney Dep. at 194. The federal defendants offer no explanation for why Schuler, who supposedly knew almost nothing about the case, was willing to vouch for Rooney on many of the points disputed in the motion for reconsideration. For the purposes of this motion, plaintiff is entitled to the inference that Schuler vouched for Rooney because they had acted in concert pursuant to a common design.

Based on the forgoing analysis of the record, I conclude that there is sufficient evidence from which a reasonable jury could conclude that the federal defendants conspired with, gave substantial assistance or encouragement to, and/or ordered or induced Rooney to take plaintiffs son from his custody in a manner that violated plaintiffs due process rights.[40]

IV. CONCLUSION

I conclude by noting that before the motion to dismiss was filed the federal defendants stated their intention to seek an interlocutory appeal if I reject their qualified immunity defense. See Federal Defendants' Br. (March 20, 2001) at 8-9 ("It is well established that a federal official is entitled to an immediate interlocutory appeal if the Court denies the defense of qualified immunity . . . Thus, if the Federal Defendants' motion to dismiss on the ground of qualified immunity is denied, they would expect to file an immediate, interlocutory appeal with the Third Circuit").

---

[40] Plaintiff has argued in the alternative that he should be permitted discovery from the federal defendants pursuant to Rule 56(f) and has submitted an affidavit in support of that request. The federal defendants object to this request. I need not reach this issue because I am denying the summary judgment motion.

Given the arguments presented to me since then, it is unclear whether the federal defendants are entitled to an interlocutory appeal. The Supreme Court has held that "a district court's denial of a claim of qualified immunity, to the extent it turns on an issue of law, is an appealable 'final decision' within the meaning of 28 U.S.C. § 1291." Mitchell v. Forsyth, 472 U.S. 511, 530 (1985) (emphasis added). As I noted above, the federal defendants have not cited, discussed, or attempted to distinguish any of the cases upon which I have based the qualified immunity decision. Instead, they have argued that plaintiffs factual claim "is limited to the allegation that the Federal Defendants offered inaccurate legal advice to counsel for the plaintiffs former wife concerning the type of relief she, as a litigant, could request from the court." See Federal Defendants' Br. (May 11, 2001) at 26. This situation is similar to Hurlman v. Rice, 927 F.2d 74, 81 (2d Cir. 1991), wherein the court found that a district court's order denying qualified immunity was not a final judgment subject to interlocutory appeal because there were "questions of fact to be answered in order to determine whether appellants [were] entitled ... to a defense of qualified immunity." It is not my role to determine whether the Hurlman analysis precludes an interlocutory appeal by the federal defendants, but I realize that it may present a problem for them.

I will proceed as follows. The accompanying Order stays discovery[41] and permits plaintiff to perfect service pursuant to 22 C.F.R. § 172.2 within 30 days and promptly notify me in writing when service has been effected. When I receive that notification, I will enter an additional Order denying the federal defendants' motions to dismiss and motions for summary judgment for the reasons contained in this Memorandum. I will then certify for immediate appeal

---

[41] I am in receipt of correspondence from the attorney defendants and plaintiff regarding the attorney defendants' subpoena of plaintiff s medical records. The attorney defendants are entitled to that discovery, but it will be deferred pending action by the Court of Appeals.

pursuant to 28 U.S.C. § 1292(b): 1) the Order denying the federal defendants' motions to dismiss and motions for summary judgment; 2) the Order in Egervary II (denying the attorney defendants' motions for summary judgment); 3) the Order in Egervary in (denying in part and granting in part the attorney defendants' motions for summary judgment); and 4) the Orders of March 6, 2001 and March 23, 2001 (granting plaintiff leave to amend the complaint to re-assert claims against the federal defendants).

If accepted by the Court of Appeals, the certification will eliminate any potential "Hurlman" problem, allow the parties to avoid multiple appeals, and permit the Court to address all of the intricate and intertwined issues in this action at the same time. In my view, these Orders involve controlling questions of law as to which there is substantial ground for differences of opinion and immediate appeal from them may materially advance the ultimate termination of the litigation.

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

OSCAR W. EGERVARY	:	
	:	
v.	:	**CIVIL ACTION**
	:	**No. 96-3039**
VIRGINIA YOUNG, et al.	:	

O'Neill, J. **September 6, 2001**

ORDER
[Entered September 6, 2001]

AND NOW, this 6th day of September, 2001, for the reasons contained in the accompanying memorandum, it is ORDERED that:

1) Discovery is stayed until further Order; and

2) Plaintiff may within 30 days of this Order perfect service pursuant to 22 C.F.R. § 172.2; and

3) Plaintiff shall promptly notify the Court in writing when service has been perfected by filing a certificate of service with the Clerk of Court.

/s/Thomas N. O'Neill, Jr., J.
THOMAS N. O'NEILL, JR., J.

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

OSCAR W. EGERVARY	:	
	:	CIVIL ACTION
v.	:	No. 96-3039
FREDERICK P. ROONEY, ESQ., et al.:		

O'Neill, J. August 15, 2000

MEMORANDUM

[Entered August 15, 2000]

This case arises out of an international child custody dispute. Plaintiff alleges that defendants violated his due process rights by removing his son from his custody and returning the child to Hungary after a Hague Convention/ICARA hearing of which plaintiff was given no notice or opportunity to be heard. On January 21, 2000,1 denied defendants' motion for summary judgment. See Egervary v. Rooney, 80 F. Supp.2d 491 (E.D. Pa. 2000) ("Egervary I"). At that time, I concluded that plaintiffs due process rights were violated and ordered the parties to brief whether summary judgment should be entered in plaintiffs favor on the question of liability on the Bivens count. Id. at 510. For the reasons stated below, I will enter summary judgment in favor of defendant Nallin on the Bivens count and will not enter summary judgment in favor of plaintiff.

BACKGROUND

As was described at greater length in Egervary I, on May 13, 1994, defendants Frederick P. Rooney, Esq., James J. Burke, Esq., and Jeffrey C. Nallin, Esq. filed a Hague Convention/ICARA petition in the U.S. District Court for

the Middle District of Pennsylvania.[1] Id. at 495. The petition alleged that plaintiff Egervary had abducted his son Oscar from Hungary and was unlawfully retaining him in this country against the wishes of his mother, Aniko Kovacs. Id. The petition was heard by the Honorable William J. Nealon and was granted after an ex parte hearing. Id. Egervary was given no notice of or opportunity to be heard in those proceedings. Id. That same day, members of the Pennsylvania State Police and the U.S. Marshals arrived at Egervary's residence, removed Oscar from his custody, and delivered the boy to defendant Rooney who immediately returned the child to Ms. Kovacs in Hungary. Id. at 494. Egervary alleges that he had not abducted his son, but rather that his wife had taken the boy to Hungary under false pretenses, hid the boy from his father once he was there, and was illegally retaining him there when Egervary retrieved him in December 1993. Id. at 493-94. He further claims that during the period when he was searching for his son, he consulted with the American Embassy in Budapest and was told that if he could find Oscar he was free to take the boy back to the United States. Id. Egervary also alleges that defendants misrepresented material issues of law and fact to Judge Nealon in the ICARA hearing. Id. at 495 n.3.

In arguing against the entry of summary judgment, defendants rely on evidence that was not presented in Egervary I regarding the events leading up to the seizure of plaintiff s son. Defendants' involvement in this case began with a referral from Ginny Young and James Schuler of the State Department on May 10, 1994:

---

[1] The Hague Convention on the Civil Aspects of International Child Abduction is a multilateral international treaty on parental kidnaping adopted by the United States and other nations in 1980. The International Child Abduction Remedies Act, 42 U.S.C. § 11601 et seq. ("ICARA") is the Hague Convention's implementing legislation. See Egervary I, 80 F. Supp.2d at 494-95, 499-501.

> The case I hope you will be able to accept is that of an almost-two-year-old child, Oscar Egervary, who, according to the information we have, was quite brutally kidnaped by his father and brought to the U.S. The mother, your client-to-be, is a violin soloist in Budapest and the father in the U.S. is unemployed, so I'm sorry but it doesn't look like there's any money anywhere.
>
> The child was born in the U.S. but the family apparently decided to go back home, and apparently the father gave up job [sic] and belongings to relocate. And then seems to have changed his mind. I figure the Hague applies in that the child lived a month or two longer in Hungary than he did in the U.S. and the information seems to indicate that Hungary had been established as the place of residence when the father did the kidnaping.[2]

See Young Ltr. of May 10, 1994 (Plaintiffs Ex. A). See also Rooney Interrogatories (Nallin's Ex. E) ¶ 6. Rooney also claims that Schuler told him the child could be ordered returned to Hungary after an ex parte hearing. Id. ¶22.

---

[2] According to Mr. Egervary's sworn testimony in these proceedings, virtually all of this information is wrong. See Egervary I, 80 F. Supp.2d at 493-94. I note that Young and Schuler were parties to this case until August 1998 when the Honorable Sue L. Robinson of the U.S. District Court in Delaware, to whom the case was then assigned, entered summary judgment on their behalf. Id at 497. I do not question her disposition of their motion; however, if Rooney's claim that the State Department suggested Oscar could be returned to Hungary after an ex parte hearing is correct, then Young and Schuler bear a great deal of responsibility for the violation of Mr. Egervary's constitutional rights, even if they cannot be held accountable in these proceedings. It is a matter of some concern that representatives of the State Department may have advocated the removal of an American citizen from this country without notice or opportunity to be heard based upon unsworn hearsay and statements such as "I figure the Hague applies" and "information seems to indicate."

On May 12, 1994, Rooney's associate, defendant Burke, contacted defendant Nallin and asked him to serve as local counsel to Rooney and Burke in the ICARA proceedings. See Nallin Dep. at 10-11. Burke and Nallin were friends and had been roommates "out of law school." Id. Nallin agreed to act as local counsel and authorized Rooney to "sign [his] name to the Pleadings" in the Egervary matter. See Nallin Ltr. of May 12, 1994 (Nallin's Ex. C).

The next day, Nallin met Rooney and Burke at the courthouse, signed the petition, and moved for their admission pro hac vice. See Nallin Dep. at 16, 19, 22. Nallin read and signed the petition and accompanying verification, but did not research the law or investigate the facts contained therein. Id. at 22-24. Rooney then conducted the ex parte hearing before Judge Nealon in the Judge's chambers. Id. at 26. Neither Burke nor Nallin were present for the hearing. Id.

After the Order had been signed, Rooney and Burke (but not Nallin) took it to the U.S. Marshal's office and accompanied the Marshals to Egervary's residence. Burke drove Rooney to the public road outside Egervary's residence, but did not leave the car. See Burke Interrogatories (Nallin's Ex. F) ¶18. The Marshals retrieved Oscar from the home and turned him over to Rooney, who was waiting at the end of the driveway. Rooney then immediately returned Oscar to his mother in Hungary.

DISCUSSION

A. Standard for Summary Judgment

Rule 56 empowers a court to enter summary judgment if "there is no genuine issue as to any material fact" and "the moving party is entitled to a judgment as a matter of law." See Fed. R. Civ. P. 56(c); Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 247 (1986). An issue is genuine

only if the evidence is such that a reasonable jury could return a verdict for the nonmoving party. Id. at 249. In considering a motion for summary judgment, "all inferences to be drawn from the evidence . . . must be viewed in the light most favorable to the party opposing the motion." Todaro v. Bowman, 872 F.2d 43, 46 (3d Cir. 1989). Because I asked the parties to brief the question of whether summary judgment against the defendants is appropriate, they will be treated as the nonmoving parties and any inferences drawn from the evidence will be viewed in the light most favorable to them.

B. State Action

Defendants first argue that summary judgment should not be entered against them because they were not federal agents. I hold that defendants Rooney and Burke were federal agents, but defendant Nallin was not.

In Bivens v. Six Unknown Agents of the Federal Bureau of Narcotics, 403 U.S. 388, 389 (1971), the Supreme Court recognized a cause of action in tort against "federal agents" acting "under color of authority" for damages that arise out of the agent's "unconstitutional conduct." See also Butz v. Economou, 478 U.S. 478, 504 (1978) ("[T]he decision in Bivens established that a citizen suffering a compensable injury to a constitutionally protected interest could invoke the general federal-question jurisdiction of the district courts to obtain an award of monetary damages against the responsible federal official."). Bivens actions are analogous to suits under 42 U.S.C. § 1983 against state officials who violate federal constitutional or statutory rights. Although the two bodies of law are not "precisely parallel," there is a "general trend" to incorporate section 1983 law into Bivens suits. See Chin v. Bowen, 833 F.2d 21, 24 (2d Cir. 1987), quoting Ellis v. Blum, 643 F.2d 68, 84 (2d Cir. 1981).

In Lugar v. Edmondson Oil Co. Inc., 457 U.S. 922 (1982), the Supreme Court established a two-step inquiry to determine when conduct satisfies the state action requirement in section 1983 suits:[3]

> First, the deprivation must be caused by the exercise of some right or privilege created by the State or by a rule of conduct imposed by the state or by a person for whom the State is responsible . . . Second, the party charged with the deprivation must be a person who may fairly be said to be a state actor. This may be because he is a state official, because he has acted togther with or obtained significant aid from state officials, or because his conduct is otherwise chargeable to the State.

Id. at 937.

In other words, action by a private party pursuant to a statute, without "something more," is not sufficient to establish state action. Id. at 939. The "something more" will vary with the circumstances of each case, but may be judged by a number of different tests, including the "public function" test, the "state compulsion" test, the "nexus" test, and the "joint action" test. Id. The Court also acknowledged that these distinct tests could be viewed as "different ways of characterizing [a] necessarily fact-bound inquiry." Id. "Only by sifting the facts and weighing circumstances can the nonobvious involvement of the State in private conduct be attributed its true significance." Id., quoting Burton v. Wilmington Parking Auth., 365 U.S. 715, 722 (1961).

---

[3] Section 1983's statutory requirement of action "under color of state law" is identical to the state action requirement under federal constitutional law. See Lugar, 457 U.S. at 929. Therefore, the Lugar analysis also applies to Bivens suits.

1. The Jordan Test of State Action

The Court of Appeals applied Lugar in Jordan v. Fox. Rothschild. O'Brien & Frankel, 20 F.3d 1250 (3d Cir. 1994), and held that a group of attorneys who used the Pennsylvania confession of judgment procedure[4] to have a judgment entered and executed against opposing parties were state actors for the purposes of a section 1983 suit. The Jordan Court drew a sharp distinction between the entry of a confessed judgment and execution on that judgment. It found that "a state procedure permitting private parties to file a complaint and confess a judgment essentially involves acquiescence by the state, not compulsion," and therefore does not constitute state action. Id. at 1266. However, that essential character changes once the confessed judgment is executed. Actions taken pursuant to execution "plainly involve or threaten the use of legal force," and therefore can be fairly attributed to the state. Id. at 1267.

The Jordan Court also specifically rejected the argument that attorneys for private parties cannot be held liable in section 1983 suits because they are officers of the court:

---

[4] As the Court of Appeals explained: "Pennsylvania law authorizes a prothonotary of any of its courts of common pleas to enter judgment by confession when a plaintiff files a complaint that includes an original or a verified copy of an instrument the defendant has signed authorizing judgment by confession, and an actual confession of judgment signed by any attorney acting for the defendant." Jordan, 20 F.3d at 1262. The remedy for relief from a confessed judgment is a petition to strike and/or open the judgment. Id The confession of judgment procedure therefore allows a party to contractually waive its right to pre-judgment process, but guarantees the party an opportunity for post-judgment relief. Confessions of judgment are common in commercial real estate disputes, such as that in Jordan.

> The Attorneys argue, however, that they cannot be treated as persons acting under color of law because they were officers of the court representing their clients . . . The principle that a private attorney does not become a state actor by virtue of being an officer of the court is not applicable to an attorney who invokes a state attachment procedure to seize property on behalf of a client. An attorney in these circumstances may be liable under § 1983. In such situations, the attorney acts in a capacity wholly distinct from any duty owed to the court.

Id. (emphasis added).

There is a close analogy between Jordan and this case. In both, attorneys for private parties invoked court procedures to secure the aid of law enforcement officials to retrieve something of value for their clients and violated the procedural due process rights of opposing parties along the way. In fact, this case is more egregious than Jordan in two respects. First, unlike the post-judgment relief that was available under the confession of judgment procedure in Jordan, in this case postdeprivation relief was impossible because Egervary's son was immediately removed from the jurisdiction. See Egervary I, 80 F. Supp.2d at 502 n.7. Second, unlike Jordan where the opposing parties were deprived of property, in this case plaintiff was deprived of his fundamental liberty interest in the custody of his child. Id. at 498-99.

However, it is also clear from Jordan that merely arguing for and obtaining a court order does not convert an attorney into an agent of the state. Rather, an attorney becomes a state actor only at the point where he "sets in motion" the execution of that order. Jordan, 20 F.3d at 1266. Applying these principles, I conclude that Nallin was not a state actor, but Rooney and Burke were.

Nallin did not participate in executing the Order. He left the courthouse on that morning not knowing whether the petition had been granted. Nallin Dep. at 53-55. Nor did he accompany Rooney and Burke to the Marshal's office or Egervary's residence. Id. Therefore, Nallin did nothing to set in motion the execution of the Order and cannot be considered a federal agent under the Jordan test.[5]

However, Rooney and Burke took further steps that rendered them state actors. After obtaining the Order, they went to the U.S. Marshal's Office and drove to the Egervary residence with the Marshals and the State Police. See Rooney Interrogatories ¶16; Burke Interrogatories ¶18. While Burke remained in the car on the public road outside of Egervary's residence, Rooney received the child from the law enforcement officials and then immediately transported him back to Hungary. See Burke Interrogatories If 18; Mem. of Rooney and Burke at 2. Despite these facts, Rooney and Burke argue that they were not involved in the execution of the Order. Id. ("There is no evidence of record that either attorney was involved in the execution of the order other than to receive the child and to transport him to his mother in Hungary."). This argument fails for two reasons.

First, Rooney and Burke's actions were greater than the conduct that rendered the Jordan attorneys state actors. In Jordan, the attorneys "set in motion" the execution of the judgment by taking "action that caused the Sheriff of Philadelphia to execute on the judgment by garnishing [the opposing party's] bank account." Id. at 1255, 1226. Jordan would therefore support the conclusion that Rooney and

---

[5] Plaintiff concedes this point. See Plaintiffs Mem, at 10. However, plaintiff argues that Nallin cannot nonetheless be considered a federal agent under the nexus test. That argument is addressed infra at B-2.

Burke were state actors even if they had merely delivered the Order to the U.S. Marshals and then walked away, but obviously they did much more.

Second, in judging whether or not Rooney and Burke participated in execution of the May 13th Order, it is important to look at the actual text of that Order. It ordered "[a]ny peace officer within the Commonwealth of Pennsylvania" to "take into protective custody Oscar Jonathan Egervary and deliver him to Petitioner's agent for immediate return to the physical custody of Petitioner." See Order of Judge Nealon dated May 13, 1994 (emphasis added). Rooney and Burke therefore cannot draw a distinction between the seizure of the child on the one hand and the delivery and return of the child on the other. All three actions (i.e., seizure, delivery, and return) are part of the May 13th Order, and Rooney and Burke participated in at least two of the three.

I therefore conclude that Rooney and Burke were federal agents under the Jordan test of state action.

2. The Nexus Test of State Action

Plaintiff concedes that defendant Nallin cannot be considered a state actor under the Jordan test, but argues that Nallin can be deemed a state actor under the nexus test. See Plaintiffs Mem. at 10. I disagree.

Plaintiff correctly points out that in Lugar the Supreme Court left open the possibility that the nexus test can supply the "something more" that establishes state action when a private party acts pursuant to a statute. See Lugar, 457 U.S. at 939. Plaintiff also correctly points out that subsequent to Lugar courts of other Circuits have applied that test. See, e.g. Chan v. City of New York, 1 F.3d 96, 106

(2d Cir. 1993); Haavistola v. Community Fire Co. of Rising Sun, 6 F.3d 211, 215 (4th Cir. 1993).[6] However, Nallin's actions do not satisfy this test.

Under the nexus test, a private decision can constitute state action when the state has "provided such significant encouragement, either overt or covert, that the choice must in law be deemed to be that of the [government]." San Francisco Arts & Athletics. Inc. v. U.S. Olympic Comm., 483 U.S. 522, 546 (19871 quoting Blum v. Yaretsky, 457 U.S. 991, 1004 (1981). Plaintiff points to two items that supposedly show such encouragement from the federal government.

First, plaintiff points to the Hague Convention itself, which obviously contemplates a significant degree of participation by the "Central Authority" of the "Contracting State" in any judicial proceedings taken in furtherance of the treaty. See Hague Convention, Article 7. However, considering the Hague Convention itself to be significant encouragement would be a form of "double counting." Lugar stands for the proposition that action taken by a private party pursuant to a statute, without "something more," is not sufficient to establish state action. Lugar, 457 U.S. at 939. Here, the Hague Convention is not "something more"; rather it is the operative law that defendants acted pursuant to and to which "something more" must be added in order for defendants to be considered state actors.

Second, plaintiff points to Rooney's contact with the U.S. State Department. It is clear that Young and Schuler of the State Department provided Rooney with significant

---

[6] I nonetheless doubt the viability of the nexus test in this Circuit. I believe the best reading of Jordan is that the Court of Appeals eschewed the specific tests of state action enumerated in Lugar and instead looked to the fact-bound "weighing of the circumstances" standard. See Jordan, 20 F.3d at 1265-66, discussing Lugar, 457 U.S. at 939. However, since Nallin's actions do not pass the nexus test, I need not consider its status in this Circuit.

encouragement to get involved in this case; however, it is also clear that Nallin never saw the letters from the State Department or had any contact with Young or Schuler. See Nallin Dep. at 44, 82-83. Accordingly, Rooney's contact with the State Department should not be imputed to Nallin for the purposes of determining state action.

I therefore find that defendant Nallin was not a federal agent and I will enter summary judgment in his favor on the Bivens count.[7]

C. Good Faith Defense

Defendants next argue that summary judgment should not be entered against them because they are entitled to an affirmative defense of good faith. The foundation for the good faith defense lies in Lugar where the Court expressed "concern[for] private individuals who innocently make use of seemingly valid state laws [that are] subsequently held to be unconstitutional." Lugar, 457 U.S. at 942 n.23. The Court observed that such concerns would best be alleviated by creating a good faith defense, but it declined to rule definitively on the availability of such a defense. Id. See also Wyatt v. Cole, 504 U.S. 158, 169 (1992) (holding that private defendants facing § 1983 liability for invoking state replevin, garnishment, or attachment statutes are not entitled to qualified immunity, but refusing to "foreclose the possibility" that such defendants "could be entitled to an affirmative defense based on good faith"). In

---

[7] In his brief, Nallin repeatedly requests that summary judgment be entered in his favor on the Bivens count. Plaintiff replies that entry of summary judgment in Nallin's favor is inappropriate because "[presently] before the Court is, in essence, a counter-motion for partial summary judgment in favor of plaintiff." See Plaintiffs Mem. at 2 n.l. However, it is clear that plaintiff was on notice that Nallin was seeking summary judgment and had the opportunity to marshal the facts so as create a material dispute. See Otis Elevator Co. v. George Washington Hotel Corp., 27 F.3d 903, 910 (3d Cir. 1994). Therefore, it is appropriate for me to enter summary judgment in Nallin's favor.

Jordan, however, the Court of Appeals ruled that such defendants are entitled to a defense of subjective good faith.[8] Jordan, 20 F.3d at 1277. However, the Jordan Court did not define the exact contours of that defense and mentioned at least three possible standards for judging defendants' good faith: recklessness, gross negligence, and gross indifference to plaintiffs rights. Id. at 1278.

It is clear that questions such as recklessness and negligence are generally reserved for the jury. In some circumstances a party may be deemed to have acted recklessly or grossly negligent as a matter of law; however, I am unable to make such a determination on the present record. The depositions of Rooney and Burke and other witnesses have yet to be taken and there is no evidence from which to determine many of the questions that will ultimately speak to defendants' good faith or bad faith. For example, did Rooney rely on the State Department's representation that an ICARA proceeding can be held without notice or the opportunity to be heard? If so, was such reliance reasonable?

I therefore conclude that: 1) defendants will be entitled to assert a good faith defense at trial; and 2) the question of whether that defe[illegible]ils as a matter of law is best determined at that time.

D. Partial Summary Judgment

Plaintiff argues in the alternative that if summary judgment on the issue of liability is not appropriate at this time I should nonetheless enter partial summary judgment on the issues decided thus far in his favor.

---

[8] Plaintiff argues that Jordan's recognition of the good faith defense was implicitly overruled by Richardson v. McKnight, 521 U.S. 399 (1997). I disagree. Richardson addresses the contours of the qualified immunity defense, but does not address the good faith defense at all. Nor does it support plaintiffs contention that defendants in this case are limited to the qualified immunity defense.

However, it is unclear whether this form of partial summary judgment is proper under Rule 56. Plaintiff relies on Rule 56(a)'s provision that a party may move for summary judgment "upon all or any part" of a claim. However, this language should be read in conjunction with Rule 56(c)'s provision that "summary judgment. . . may be rendered on the issue of liability alone although there is a genuine issue as to the amount of damages." Because Rule 56(c) refers to partial summary judgment on the issue of liability, but not on the individual elements that form the basis of a finding of liability, it arguably implies that a court cannot enter summary judgment on "less than" the question of liability. Further complicating this question is Rule 56(d), which provides that if a motion for summary judgment does not fully resolve a claim, a court may:

> ascertain what material facts exist without substantial controversy and what material facts are actually and in good faith controverted. It shall thereupon make an order specifying the facts that appear without substantial controversy, including the extent to which the amount of damages or other relief is not in controversy, and directing such further proceedings in the action as are just. Upon trial of the action the facts so specified shall be deemed established, and the trial shall be conducted accordingly.

See Fed. R. Civ. P. 56(d).

Cases and commentators are split on the interplay among these three provisions and the circumstances under which partial summary judgment is appropriate. See Advanced Semiconductor Materials Am. Inc. v. Applied Materials. Inc., No. C-93-20853, 1995 WL 419747, at 2-3 (N.D. Cal. July 10, 1995) (discussing the split and citing cases). However, I need not weigh-in on this debate because

it is agreed that a court has discretion to decline to enter partial summary judgment if it would not "materially expedite the adjudication." 10B Wright, Miller & Kane, Federal Practice and Procedure § 2737 (3d ed. 1998). That is the case here. The evidence establishing the violation of plaintiff s due process and rights and defendants' status as state actors is interwoven with the evidence of good faith and/or bad faith. Therefore, partial summary judgment will not shorten the presentation of evidence at trial and will accordingly be denied.

An appropriate Order follows.

IN THE UNITED STATES DISTRICT COURT FOR THE
EASTERN DISTRICT OF PENNSYLVANIA

OSCAR W. EGERVARY	:	
	:	CIVIL ACTION
v.	:	No. 96-3039
FREDERICK P. ROONEY, ESQ., et al.:		

O'Neill, J. August 15, 2000

ORDER

[Entered August 15, 2000]

AND NOW this 15 day of August, 2000, for the reasons contained in the accompanying Memorandum, it is hereby ORDERED that summary judgment is entered in favor of defendant Nallin and against plaintiff Egervary on Count I (Bivens). It is further ORDERED that:

1. The parties shall complete discovery within 120 days of this Order;

2. Defendant Nallin shall file any dispositive motion regarding Count II (conspiracy) fourteen days after the close of discovery and plaintiff shall reply fourteen days thereafter.

/s/Thomas N. O'Neill, Jr., J.
THOMAS N. O'NEILL, JR., J.

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

OSCAR W. EGERVARY	: CIVIL ACTION
v.	: No. 96-3039
FREDERICK P. ROONEY, ESQ., et al. :	

O'Neill, J. January 21, 2000

MEMORANDUM
[Entered January 21, 2000]

I. INTRODUCTION

Defendants' motion for summary judgment raises questions of first impression involving the Hague Convention on the Civil Aspects of International Child Abduction and the International Child Abduction Remedies Act ("ICARA"). The Court must decide whether removing an allegedly-kidnaped child from his father's custody and returning the child to his mother in a foreign country without notice and opportunity to be heard gives rise to a due process claim under Bivens v. Six Unknown Agents of the Federal Bureau of Narcotics, 403 U.S. 388 (1971). If so, the Court must decide whether the claim survives various defenses, including waiver and immunity. For the reasons stated below, defendants' motion for summary judgment will be DENIED and defendants will be ORDERED to submit further briefing as to whether summary judgment should be entered against them on the question of liability.

II. BACKGROUND

A. Mr. Egervary's Marriage to Ms. Kovacs and Oscar's Alleged Abduction[1]

Oscar Egervary ("plaintiff or "Mr. Egervary") was born in 1955 in Hungary, where he suffered political oppression at the hands of the then-communist government because his father was a church official. See Egervary Aff. ¶¶1-2. In 1980, he emigrated to the United States as a political refugee. Id. He became a citizen of the United States in 1987. Id. ¶3.

In 1990, Mr. Egervary became romantically involved with Aniko Kovacs ("Ms. Kovacs"), a Hungarian national who came to the United States to study music. Id. ¶4. They briefly returned to Hungary in 1991 to be wed by Mr. Egervary's father. Id. Thereafter, they established their martial residence in Hackensack, New Jersey. Id. ¶5. Their son, Oscar Jonathan Egervary ("Oscar"), was born on Independence Day, July 4, 1992. Id. ¶6.

In February 1993, Ms. Kovacs, a concert violinist, traveled to Hungary with Oscar to perform in a concert to be held in Budapest that March. Id. ¶7. They were scheduled to return to the United States on April 6, 1993, and Mr. Egervary had purchased a ticket to fly to Hungary and escort them back to the United States. Egervary Supplemental Aff. ¶2. A few days before, however, Ms. Kovacs called Mr. Egervary and said she needed to stay until the beginning of May to perform in another concert. Id. Once again, shortly before she and Oscar were to return in May, Ms. Kovacs called Mr. Egervary and said that she would be staying in Hungary because she had an

---

[1] The Court takes no position on whether plaintiff's removal of his son from Hungary was lawful under the Hague Convention or any other law. However, it is necessary to describe Mr. Egervary's version of these events in order to show the issues he could have raised in an ICARA hearing if he had been afforded notice and opportunity to be heard.

opportunity to take a teaching position in Budapest until the end of the year. Id. Shortly thereafter, she informed Mr. Egervary that she would not return to the United States and would not return Oscar to this country. Id.

In June and July of that year, Mr. Egervary traveled to Hungary in an attempt to reconcile with his wife and bring Oscar home. Id. In July, Ms. Kovacs returned to the United States with Mr. Egervary for a short time, but she insisted on leaving Oscar in Hungary with her parents. Id.

In August, Mr. Egervary returned to Hungary and stayed there for three months in an another attempt to reconcile with his wife. Id. During that stay, Mr. Egervary took a job teaching English in order to support himself. Id. He worked there from approximately August to November of 1993. Id. He moved some of his personal belongings from the United States, but he did not plan on establishing residence there and did not register with the Hungarian government as a resident. Id.

In September, Ms. Kovacs took Oscar to an undisclosed location within Hungary in an apparent attempt to hide the child from his father. Egervary Aff. ¶8. At that time, she left Mr. Egervary a letter that, in part, stated: "I'd like to notify you in this farewell letter that I've moved out from you, together with Ossika [Oscar] ... I moved to a location unknown to others deliberately and I didn't move to my parents on purpose." Egervary Supplemental Aff. ¶3. Mr. Egervary searched for his son for approximately three months. Id. During that time, he consulted with the American Embassy in Budapest and was told that if he could find Oscar he was free to take him back to the United States. Id.

On December 18, 1993, Mr. Egervary found Ms. Kovacs and Oscar leaving her parents' apartment house in Budapest. Id. According to Mr. Egervary, Oscar's clothing

was "dirty and ragged" and he appeared undernourished. Egervary Aff. ¶9. Mr. Egervary took Oscar from Ms. Kovacs and left Hungary with him the next day. Id. Upon their return to the United States, Mr. Egervary and Oscar set up residence in Monroe County, Pennsylvania. Id.

On May 13, 1994, members of the Pennsylvania State Police and the U.S. Marshals arrived at Mr. Egervary's home with an Order signed by the Honorable William J. Nealon of the United States District Court for the Middle District of Pennsylvania. Id. If 10. Pursuant to the Order, Oscar was forcibly removed from Mr. Egervary's custody and delivered to defendant Frederick P. Rooney, Esq. See Complaint If 15; Mem. of Defendants Frederick P. Rooney, Esq. and James C. Burke, Esq. at 6 ("Rooney Mem."); Mem. of Defendant Jeffrey C. Nallin, Esq. at 3 ("Nallin Mem."). Defendant Rooney then took Oscar to the airport, flew him to Europe and delivered him to Ms. Kovacs. Id. All parties concede that Mr. Egervary had no notice or opportunity to be heard in the proceedings that led to the May 13th Order.

B. The Hague Convention/ICARA Proceedings

The Hague Convention is a multilateral international treaty on parental kidnaping adopted by the United States and other nations in 1980. The goal of the Convention is to "protect children internationally from the harmful effects of their wrongful removal or retention and to establish procedures to ensure their prompt return to the State of their habitual residence." See Hague Convention, Preamble. The Convention reflects "a universal concern about the harm done to children by parental kidnaping and a strong desire among the Contracting States to implement an effective deterrent to such behavior." Feder v. Evans-Feder, 63 F.3d 217, 221 (3d Cir. 1995). The Convention is "designed to restore the 'factual' status quo which is unilaterally altered when a parent abducts a child." Id. The Hague Convention has been implemented by the International

Child Abduction Remedies Act, 42 U.S.C. § 11601 et seq. ICARA vests state and district courts with concurrent jurisdiction over claims arising under the Convention and empowers those courts to order the return of kidnaped children. See 42 U.S.C. § 11603. An ICARA hearing is not a custody hearing. See Blondin v. Dubois, 189 F.3d 243, 245 (2d Cir. 1999) (under ICARA, a district court has "the authority to determine the merits of an abduction claim, but not the merits of the underlying custody claim"), quoting Friedrich v. Friedrich, 983 F.2d 1396, 1400 (6th Cir. 1993); Hague Convention, Article 19 ("A decision under this Convention concerning the return of the child shall not be taken to be a determination on the merits of any custody issue."). Rather, an ICARA proceeding merely determines which nation should hear the underlying custody claim. Blondin, 189 F.3d at 246.

An ICARA petitioner bears the burden of proving by a preponderance of the evidence that the child in question has been wrongfully removed (or retained) from the nation of his or her "habitual residence" immediately before the removal. See 42 U.S.C. § 11603(e)(l)(A); Hague Convention, Articles 3 and 4. If the petitioner establishes that the removal was wrongful, the child must be returned unless the respondent can establish one of four different defenses: 1) the ICARA proceedings were not commenced within one year of the child's abduction; 2) the petitioner was not actually exercising custody rights at the time of the removal; 3) there is a grave risk that return would expose the child to "physical or psychological harm or otherwise place the child in an intolerable situation"; or 4) return of the child "would not be permitted by the fundamental principles . . . relating to the protection of human rights and fundamental freedoms." Id.; Hague Convention, Articles 12, 13 and 20. The first two defenses can be established by a preponderance of the evidence; the last two must be established by clear and convincing evidence. Id; 42U.S.C. § 11603(e)(2).

ICARA also provides that notice "be given in accordance with the applicable law governing notice in interstate child custody proceedings." 42 U.S.C. § 11603(c). However, because there is an inherent risk of flight during the pendency of a petition, courts "may take or cause to be taken measures under Federal or State law, as appropriate, to protect the well-being of the child involved or to prevent the child's further removal or concealment before the final disposition of the petition." See 42 U.S.C. § 11604(a) (emphasis added).

Sometime after Oscar was taken from his custody, Mr. Egervary learned that on that same day defendants (all attorneys) had filed an ICARA petition on behalf of his estranged wife. The petition alleged that Mr. Egervary's removal of Oscar from Hungary in December 1993 was a "wrongful removal" within the meaning of the Convention. See ICARA Petition of Aniko Kovacs dated May 13, 1994 at 2. It further requested that Oscar be "returned to the Petitioner [Ms. Kovacs] or to Petitioner's agent, Federick P. Rooney, Esquire, who will temporarily care for the child until the child is turned over, through agent, Frederick P. Rooney, Esquire, to the custody of the Petitioner." Id. at 3. However, the events surrounding consideration of the petition are in dispute.[2]

---

[2] Ordinarily, in considering a motion for summary judgment, the Court views the facts in the light most favorable to the nonmoving party (here, plaintiff). However, because of a discovery dispute, the parties have submitted no evidence upon which the Court could establish the facts surrounding the ex parte ICARA proceedings for the purposes of this motion. If the Court needed to establish those facts in order to rule on the motion, it would grant plaintiffs motion in the alternative under Fed. R. Civ. P. 56(f) and provide time for the necessary depositions to be taken. However, since defendants' motion goes to the sufficiency of plaintiff s claim as a matter or law, it can be considered without further delay. Nonetheless, for the purposes of this factual narrative, the Court will relate the representations of both sides as to what the evidence is likely to show occurred in those ex parte proceedings.

According to the defendants, they presented Judge Nealon with "several alternatives, including holding a hearing." Rooney Mem. at 6. Defendants further claim that Judge Nealon chose to forego a hearing and ordered the immediate seizure and return of Oscar to Ms. Kovacs because Judge Nealon feared Mr. Egervary would go into hiding if he had notice. Id.

Plaintiff, on the other hand, claims that defendant Rooney told Judge Nealon that the defendants "represented the State Department, that no notice to Mr. Egervary was required, that the State Department 'does this all the time,' and that all arrangements had been made to take plaintiffs son to Hungary that afternoon as soon as Judge Nealon sign[ed] the order permitting them to move forward."[3] Plaintiffs Mem. at 11.

Regardless of which version is accurate, the petition was granted, and Oscar was returned to Hungary that same day without any notice or opportunity to be heard having been afforded to Mr. Egervary.

---

[3] The basis for this claim appears in the Affidavit of Gary L. Azorsky, Esq., plaintiffs counsel: "At a case management conference in this action before The Honorable William J. Nealon, Jr. on December 11, 1997, defendants' counsel presented Judge Nealon with the same factual allegations that are now [summarized in the main text above]. Judge Nealon advised counsel that his recollection significantly differed from defendants' stated position. His Honor stated that it was not true that defendants presented him with several options from which to choose, and that he decided upon one option following careful review and consideration of all options. His Honor advised that it was his recollection that Mr. Rooney stated that he represented the State Department, that no notice to Mr. Egervary was required, that the State Department 'does this all the time,' and that all arrangements had been made to take plaintiffs son to Hungary that afternoon as soon as His Honor signs [sic] the order permitting them to move forward." Aff. of Gary L. Azorsky, Esq. 1) 10-11. Mr. Azorsky also states that Judge Nealon agreed to make himself available for deposition to recount these events, if necessary. Id. ¶11.

C. The Motion for Reconsideration

On May 27, 1994, Mr. Egervary filed a motion for reconsideration of the May 13th Order. See Docket for In re Oscar Jonathan Egervary, No. 94-707, M.D. Pa. 1994. Oral arguments on the motion were heard on July 25, 1994. Id. By December, the motion had been fully briefed, but had not been decided.

On December 19, 1994, plaintiffs counsel responded to an inquiry regarding the status of the motion and the then-pending custody proceedings in Hungary. See Letter from Gary L. Azorsky, Esq. to Judge Nealon dated December 19, 1994 at 1. Plaintiffs counsel first acknowledged that the custody proceedings might moot the motion for reconsideration. Id. Plaintiffs counsel then presented Judge Nealon with two options:

> I recommend, and respectfully request, that Your Honor place this action in the civil suspense docket until such time as the parties can better ascertain whether the Hungarian action is likely to be resolved in a timely fashion. If the Hungarian action continues to drag on without a discernable endpoint after several months, then I will contact Your Honor and request that this matter be returned to the active docket so that we may proceed with a hearing.
>
> In the alternative, since the issues regarding the propriety of Mrs. Kovacs' initial petition have now been fully briefed, I dutifully and respectfully invite Your Honor to grant Mr. Egervary's motion for reconsideration and order the immediate return of his child.

Id. at 2.

In response to that letter, Judge Nealon entered the following Order a few days later:

> ORDER by Judge William J. Nealon; the Court having been previously advised that the above action cannot proceed to trial and disposition because of the following reason: Matter pending resolution in Hungarian courts; IT IS ORDERED that the Clerk of Court mark this action closed for statistical purposes; and IT IS FURTHER ORDERED that the Court shall retain jurisdiction; and that the case be restored to the trial docket when the action is in a status so that it may proceed to final disposition; this Order shall not prejudice the rights of the parties to this litigation.

See Order by Judge Nealon dated December 23, 1994 (emphasis added).

After a lengthy custody dispute, the Hungarian court awarded custody of Oscar to Ms. Kovacs in April 1996. See Deposition Tr. of Oscar Egervary dated March 11, 1999 at 18-19 ("Egervary Dep.").

D. Procedural History of this Case

After the Hungarian court awarded custody to Ms. Kovacs, plaintiff filed this action in the Eastern District of Pennsylvania (the "Eastern District") on April 17, 1996 and the case was assigned to the Honorable E. Mac Troutman. The complaint named Frederick P. Rooney, Esq., James C. Burke, Esq. and Jeffrey C. Nallin, Esq., the three attorneys who represented Ms. Kovacs in the ICARA hearing before Judge Nealon, as well as two officials of the U.S. State Department. Count I one of the complaint alleges that defendants violated plaintiffs due process rights under the

Fifth Amendment.[4] Count II alleges that defendants conspired to violate those rights.[5]

On February 4, 1997, Judge Troutman transferred the case to the Middle District of Pennsylvania (the "Middle District") pursuant to 28 U.S.C. § 1406, finding that venue was improper in this district.[6] There the case was assigned to Judge Nealon, who later recused himself when it became clear that he might be a witness in these proceedings. After the remaining judges in the Middle District also recused themselves, the Honorable Sue L. Robinson of the U.S. District Court for the District of Delaware was designated to preside over the case in the Middle District. On August 17, 1998, Judge Robinson granted summary judgment in favor of the State Department defendants. Thereafter, upon unopposed motion by plaintiff, Judge Robinson transferred the case back to the Eastern District pursuant to 28 U.S.C. § 1404.

---

4 Plaintiff challenges the constitutionality of the Hague Convention and ICARA as applied in these circumstances. This decision should not be read to imply any view on the facial validity of those laws.

5 The complaint does not state whether the conspiracy count arises under state or federal law, and defendants have not challenged the jurisdictional basis for that claim. The Court finds that even if the conspiracy count is a state law claim jurisdiction is proper under 28 U.S.C. § 1367. Federal courts have traditionally avoided deciding issues involving family law. See generally Solomon v. Solomon, 516 F.2d 1018, 1024-25 (3d Cir. 1975) (discussing the domestic relations exception to federal subject matter jurisdiction). However, the domestic relations exception does not apply to due process claims arising out of custody disputes. See Weller v. Dep't. ofSoc. Servs., 901 F.2d 387, 396 (4th Cir. 1990).

6 Plaintiff and the three attorney defendants were residents of the Eastern District; the State Department defendants were not, and the events complained of occurred in the Middle District.

III. DISCUSSION

A. Standard for Summary Judgment

Rule 56 empowers a court to enter summary judgment if "there is no genuine issue as to any material fact" and "the moving party is entitled to a judgment as a matter of law." See Fed. R. Civ. P. 56(c); Anderson v. Liberty Lobby. Inc., 477 U.S. 242, 247 (1986). An issue is genuine only if the evidence is such that a reasonable jury could return a verdict for the nonmoving party. Id. at 249. In considering a motion for summary judgment, "all inferences to be drawn from the evidence . . . must be viewed in the light most favorable to the party opposing the motion." Todaro v. Bowman, 872 F.2d 43, 46 (3d Cir. 1989).

B. Bivens Claim

The Due Process Clause of the Fifth Amendment states that no person shall "be deprived of life, liberty, or property without due process of law." U.S. Const, amend. V. "Many controversies have raged about the cryptic and abstract words of the Due Process Clause but there can be no doubt that at a minimum they require that deprivation of life, liberty or property by adjudication be preceded by notice and opportunity for hearing appropriate to the nature of the case." Mullane v. Central Hanover Bank & Tr. Co., 339 U.S. 306. 313 (19501 Moreover, neither of these "fundamental requisite[s]" of due process is satisfied by mere pretense. Id. at 314. Notice must be "reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action." Id. Similarly, the opportunity to be heard "must be granted at a meaningful time and in a meaningful manner." Armstrong v. Manzo, 380 U.S. 545, 552(1965).

In Bivens v. Six Unknown Agents of the Federal Bureau of Narcotics, 403 U.S. 388, 389 (1971), the Supreme Court recognized a tort cause of action against "federal

agents" acting "under color of authority" for damages that arise because of the agent's "unconstitutional conduct." See also Butz v. Economou, 478 U.S. 478, 504 (1978) ("[T]he decision in Bivens established that a citizen suffering a compensable injury to a constitutionally protected interest could invoke the general federal-question jurisdiction of the district courts to obtain an award of monetary damages against the responsible federal official."). Bivens actions are analogous to suits under 42 U.S.C. § 1983 against state officials who violate federal constitutional or statutory rights. Although the two bodies of law are not "precisely parallel," there is a "general trend" to incorporate Section 1983 law into Bivens suits. See Chin v. Bowen, 833 F.2d 21, 24 (2d Cir. 1987), quoting Ellis v. Blum, 643 F.2d 68, 84 (2d Cir. 1981).

Attorneys who assist in executing a federal court order are federal agents acting under the color of authority and can be held liable in a Bivens suit. See Vector Research. Inc. v. Howard & Howard Attorneys PC, 76 F.3d 692 (6th Cir. 1996) (holding that attorneys who obtained an ex parte court order authorizing a search pursuant to the Copyright Act and assisted U.S. Marshals in the search could be held liable as federal agents acting under the color of authority in a Bivens suit). Moreover, defendants have conceded for the purposes of this motion that they were federal agents acting under the color of authority. See Nallin Mem. at 9. Therefore, the Court need only decide whether defendants violated plaintiffs due process rights and whether plaintiffs claim survives defendants' defenses.

Procedural due process questions are examined in two steps. See Kentucky Dep't. of Corrections v. Thompson, 490 U.S. 454, 460 (1989). The first step "asks whether there exists a liberty interest which has been interfered with by the State." Id. If there is such an interest, the second step asks "whether the procedures attendant upon that deprivation were constitutionally sufficient." Id. The Court

concludes that plaintiff had a liberty interest in the custody of his son and on the present record it is clear that defendants unconstitutionally infringed on that liberty interest by seizing plaintiffs son and returning him to Hungary without notice or opportunity to be heard.

1. Liberty Interest

It is well established that parents have a fundamental liberty interest in the custody of their children. See Hollingsworth v. Hill, 110 F.3d 733, 739 (10th Cir. 1997) (in a Section 1983 suit brought by a mother whose children were removed from her custody without prior notice, the mother had "a constitutionally protected liberty interest [in the custody of her children] which could not be deprived without due process"); Jordan v. Jackson, 15 F.3d 333, 342 (4th Cir. 1994) (in a Section 1983 suit brought by parents whose son was removed from their custody without prior notice, court found that there "are few rights more fundamental in and to our society than those of parents to retain custody over and care for their children, and to rear their children as they deem appropriate"); Weller v. Dep't. of Soc. Servs., 901 F.2d 387, 391 (4th Cir. 1990) (in a Section 1983 suit brought by a father whose children were removed from his custody without prior notice, the father "clearly [had] a protectible liberty interest in the care and custody of his children"); Robison v. Via, 821 F.2d 913, 921 (2d Cir. 1987) (in a Section 1983 suit brought by a mother whose children were removed from her custody without prior notice, "it was clearly established that a parent's interest in the custody of his or her children was a constitutionally protected interest of which he or she could not be deprived without due process"); Hooks v. Hooks, 771 F.2d 935, 941 (6th Cir. 1985) (in a Section 1983 suit brought by a mother whose children were removed from her custody without prior notice, court found that it is "well-settled that parents have a liberty interest in the custody of their children"); Lossman v. Pekarske, 707 F.2d 288, 290 (7th Cir. 1983) (in a

Section 1983 suit brought by a father whose children were removed from his custody without prior notice, the father "unquestionably" had a liberty interest in the custody of his children); Duchesne v. Sugarman, 566 F.2d 817, 825 (2d Cir. 1977) (in a Section 1983 suit brought by a mother whose children were removed from her custody without prior notice, court found a liberty interest in "the most essential and basic aspect of familial privacy, the right of the family to stay together without the coercive interference of the awesome power of the state").

Moreover, it is clear that plaintiff had a fundamental liberty interest in the custody of his son despite the fact that his estranged wife contested legal custody. Courts have recognized a parent's liberty interest in the custody of a child even when the parent only has physical, as opposed to legal, custody. For example, in Farina v. City of Tampa, 874 F. Supp. 383 (M.D. Fla. 1994), prospective adoptive parents sued the city police after officers returned the child to his biological parents without any prior notice or judicial proceedings. Defendants conceded the underlying facts and acknowledged that the operative law provided for notice and opportunity to be heard before custody decisions are made. Defendants argued, however, that plaintiffs had no protected liberty interest because they had only physical, not legal, custody of the child. The court flatly rejected that distinction and found "no authority in support of [defendants'] distinction between physical and legal custody for procedural due process purposes." Id. at 386. On this basis, the court granted partial summary judgment in favor of the plaintiffs. Id. at 387.

Plaintiff therefore had a fundamental liberty interest in - at the very least - the continued physical custody of his son.

2. Constitutionality of the Process

Since plaintiff had a liberty interest in the custody of his son, the Court must next decide whether the procedure whereby that liberty interest was infringed upon in this case satisfied due process. The Court concludes that it did not.

a. Procedural Rights Under ICARA

The starting point for this inquiry is ICARA, which provides that notice "shall be given in accordance with the applicable law governing notice in interstate child custody proceedings." 42 U.S.C. § 11603(c). Courts interpreting this provision have found the "applicable law" to be the Parental Kidnaping Prevention Act, 28 U.S.C. § 1738A ("PKPA"), and the Uniform Child Custody Jurisdiction Act, 23 Pa.C.S.A. § 5341, et seq. ("UCCJA"). See Brooke v. Willis, 907 F. Supp. 57, 60 (S.D.N.Y. 1995); Klam v. Klam, 797 F. Supp. 202, 205 (E.D.N.Y. 1992). Both the PKPA and UCCJA provide for "reasonable notice and opportunity to be heard." See 28 U.S.C. § 1738A(e); 23 Pa.C.S.A. § 5345. This generally means "a plenary hearing at which both sides are heard." Klam ,797 F. Supp. at 205.

Klam is instructive. In Klam. a German father alleged that his ex-wife was unlawfully retaining their children in New York and that the children should be returned to Germany pursuant to the Hague Convention and ICARA. To that end, he filed an ICARA petition and warrant in lieu of a writ of habeas corpus asking that his children be taken into custody before the mother was notified of the ICARA proceedings. Id. at 203. In support of this request, the petition made a series of conclusory assertions, including the claim that the children were being "wrongfully detained" from the nation of their "habitual residence" and that the children would be "carried out of the jurisdiction" and "suffer irreparable injury" unless the petition was granted. Id. at 204. The court was confronted

with the issue of whether the petition could be granted ex parte based purely on the assertions contained in the petition. Id. at 206.

The court concluded that ex parte relief would violate the procedural protections of ICARA and gave two rationales for this conclusion. First, the court applied by analogy a series of cases holding that ex parte relief is inappropriate under the PKPA and UCCJA, absent "a showing of extraordinary circumstances." Id. Second, the court was hesitant to rely on the unsubstantiated allegations contained in the petition. Id. The Court therefore denied the ex parte request for interim relief, but stated that it would allow the father to proceed once the mother had been properly served. Id. at 207 n. 5.

The petition defendants submitted to Judge Nealon was remarkably similar to the petition rejected by the court in Klam. For example, the petition alleged that Mr. Egervary's removal of Oscar from Hungary in December 1993 was a "wrongful removal" from the child's "habitual residence" within the meaning of the Hague Convention and ICARA. See ICARA Petition of Aniko Kovacs dated May 13, 1994 ¶¶ 2, 5 and 6. The petition also asked for a warrant in lieu of habeas corpus based upon the allegation that Mr. Egervary would "upon being informed of these proceedings . . . further abduct and secrete the child." Id. ¶12. However, defendants' petition also went a significant step further than the Klam petition. Defendants asked that Oscar be immediately turned over to defendant Rooney and returned to Ms. Kovacs, rather than being held pending final resolution of the ICARA petition. Id. ¶13. The petition at issue in this case was, therefore, a more egregious violation of plaintiff s rights than the petition involved in Klam.

Defendants seek to moot the obvious conclusion that plaintiffs rights under ICARA were violated by arguing that Oscar would have been immediately returned to Ms. Kovacs even if a hearing had been held that day. See, e.g. Nallin Mem. at 13-14. The Court cannot accept that conclusion. Mr. Egervary had compelling, though not necessarily dispositive, arguments that could have been presented if he had been afforded notice and opportunity to be heard.

First, Mr. Egervary maintains that Ms. Kovacs took Oscar out of this country under false pretenses and then refused to return him. See generally Egervary Supplemental Aff. ¶2. If these allegations are true, then Ms. Kovacs likely violated the Hague Convention by unlawfully retaining Oscar outside of the country of his habitual residence.

Second, Mr. Egervary could have argued that the Hague Convention did not apply to Ms. Kovacs' claim because Hungary was not Oscar's habitual residence. Under ICARA, Ms. Kovacs had the burden of proving by a preponderance of evidence that Hungary was Oscar's habitual residence. See 42 U.S.C. § 11602(e). In Feder v. Evans-Feder, 63 F.3d 217, 224 (3d Cir. 1995), the Court of Appeals defined "habitual residence" as "the place where [the child] has been physically present for an amount of time sufficient for acclimatization and which has a 'degree of settled purpose' from the child's perspective." The "shared intentions" of both the parents are relevant to this inquiry. Id. The Feder Court also specifically criticized a district court decision that found Germany was a child's habitual residence after "what began as a voluntary visit" to that nation turned into a "coerced residence." Id. at 224-25, discussing In re Appliation of Ponath, 829 F. Supp. 363 (D.Utah 1983). Consistent with Feder. Mr. Egervary could have argued that Oscar never experienced a degree of settled purpose in Hungary because he lived there for such a short time and was frequently moved around the country because of his mother's attempt to hide the child from his

father. In addition, Oscar's parents never had a shared intention of residing in Hungary. Oscar was in Hungary only because his mother took him there, and she may have taken him there under false pretenses. Also relevant to this inquiry is the fact that Oscar is a United States citizen and at that point had spent the overwhelming majority of his life here.

Finally, even if the court rejected these arguments, Mr. Egervary would have had the opportunity to prove by clear and convincing evidence that Oscar's return would expose the child to "physical or psychological harm or otherwise place the child in an intolerable situation." See 42 U.S.C. § 11603(e)(2)(A); Hague Convention, Article 13. Specifically, Mr. Egervary could have developed the evidence that when he found his son in Hungary in December 1993 the boy "appeared undernourished" and wore "dirty and ragged" clothing. See Egervary Aff. ¶9.

The Court makes no finding as to whether Mr. Egervary would have prevailed on any of these arguments. Such a finding would not be possible without a full evidentiary hearing and is likely irrelevant to this case. It is nonetheless clear that plaintiff was deprived of any opportunity to present these arguments. The Court recognizes, however, that the mere fact that defendants violated plaintiffs statutory rights does not necessarily prove that they also violated his constitutional rights. Cf Robison, 821 F.2d at 923 ("Federal constitutional standards rather than state standards define the requirements of procedural due process."). Therefore, the Court must also consider the due process requirements that apply in ordinary, i.e., non-Hague Convention, custody disputes.

b. Prior Process

Obviously, plaintiffs due process rights would not have been violated if he had received notice and opportunity to be heard prior to Oscar's removal from his custody. However, "due process is flexible and calls for such

procedural protections as the particular situations demands." Morrissey v. Brewer, 408 U.S. 471, 481 (1972). For this reason, courts have found that even though parents have a fundamental liberty interest in the custody of their children they do not always have a right to prior process when the state removes their children from their custody.

Courts agree that "in emergency circumstances which pose an immediate threat to the safety of a child, officials may temporarily deprive a parent of custody without parental consent or a court order." Hollingsworth, 110 F.3d at 739. See also Jordan, 15 F.3d at 343 (parents can be deprived of custody of their child without prior process "where emergency action is necessary to avert imminent harm to a child."); Weller, 901 F.2d at 393 ("Due process does not mandate a prior hearing where emergency action may be needed to protect a child."); Doe v. Hennepin County, 858 F.2d 1325, 1329 (8th Cir. 1988) (the state may intervene on behalf of "abused children" without prior notice); Robison, 821 F.2d at 921 ("officials may temporarily deprive a parent of custody in 'emergency' circumstances"); Lossman, 707 F.2d at 291 ("When a child's safety is threatened, that is justification enough for action first and hearing afterwards."); Duchesne, 566 F.2d at 826 (child can be removed without prior process in "extraordinary situations").

It is unclear whether the facts in this case justified Oscar's removal without prior process. In all the cases cited above where an emergency removal was found to be justified, there was specific evidence of an imminent threat of severe neglect or physical abuse. See Jordan, 15 F.3d at 336 (neglect); Welter, 901 F.2d at 391 n.7 (physical abuse); Doe, 858 F.2d at 1326 (sexual abuse); Robison, 821 F.2d at 916 (sexual abuse); Lossman, 707 F.2d at 289 (physical abuse and death threats); Duchesne, 566 F.2d at 822 (neglect). By contrast, in Hollingsworth, where there were merely general allegations of "abuse, injury, molestation, and harassment"

but no concrete evidence of an "immediate threat," the removal without prior process was found to be unjustified. Hollingsworth, 110 F.3d at 740.

In this case, plaintiff was accused of kidnaping his son. Parental kidnaping is a serious offense that inherently involves a risk of further flight, but it is unclear whether that allegation alone is serious enough to justify emergency action to remove a child from his parent's custody without prior process. Notably, the court in Klam found that the bare allegation of kidnaping and the inherent risk of flight that comes with it, without more, are insufficient to justify such emergency action. Klam, 797 F. Supp. at 207-07. The court hinted, however, that additional specific evidence of physical abuse or risk of flight might have justified emergency action. Id. While it is likely that the Klam analysis applies here and plaintiff was entitled to prior process in these circumstances, the Court need not resolve the issue because plaintiff was denied a prompt, state-initiated postdeprivation hearing.

c. Prompt, State-Initiated Postdeprivation Hearing

Even when an imminent threat of harm justifies removing a child from their parent's custody without prior process, there must be a prompt, state-initiated postdeprivation hearing to ratify the removal. See Jordan, 15 F.3d at 343 ("[T]he requirements of due process may be delayed where emergency action is necessary to avert imminent harm to a child, provided that post-deprivation process to ratify the emergency action is promptly accorded."); Weller, 901 F.2d at 396 ("[E]ven if it is constitutionally permissible to temporarily deprive a parent of the custody of a child in an emergency, the state has the burden to initiate prompt judicial proceedings to ratify its emergency action."); Doe, 858 F.2d at 1329 ("[T]he state may intervene on behalf of abused children . . . if the state provides an adequate postdeprivation hearing."); Lossman,

707 F.2d at 291 ("[W]here the state has a procedure for a prompt, adversary postdeprivation hearing in a child custody matter and the hearing is held and establishes that the state officers acted prudently in removing the child from the parent's custody without a prior hearing, that finding extinguishes a claim that the failure to hold a predeprivation hearing was a denial of due process."); Duchesne, 566 F.2d at 826 ("[I]n those 'extraordinary situations' where deprivation of a protected interest is permitted without prior process, the constitutional requirements of notice and an opportunity to be heard are not eliminated, but merely postponed.").

Defendants point to two events that supposedly gave plaintiff an adequate opportunity to be heard after Oscar had been removed from his custody: the motion for reconsideration before Judge Nealon and the custody proceedings in Hungary. Neither of these proceedings satisfy due process because neither was state-initiated and neither was sufficiently prompt.[7]

The Duchesne Court explained why a postdeprivation custody hearing must be initiated by the state:

> In this situation, the state cannot constitutionally "sit back and wait" for the parent to institute judicial proceedings. It

---

[7] Courts have recognized that it is virtually impossible for a parent to receive an adequate postdeprivation hearing once the child has been removed to another jurisdiction. See Weller, 901 F.2d at 396 (expressing "additional concern" because removal of the child from Maryland to Louisiana reduced the possibility of a prompt postdeprivation hearing); Hooks, 771 F.2d at 942-43 (noting that child's removal to another jurisdiction "effectively eliminat[ed]" the possibility of an adequate postdeprivation hearing). The concern expressed in Weller and Hooks is even more serious where, as here, the child has been removed to a foreign country and any post-removal judicial action implicates complex issues of jurisdiction, comity and international law.

> cannot adopt for itself an attitude of "if you don't like it, sue." The burden of initiating judicial review must be shouldered by the government. We deal here with an uneven situation in which the government has a far greater familiarity with the legal procedures available for testing its action. In such a case, the state cannot be allowed to take action depriving individuals of a most basic and essential liberty interest which those uneducated and uninformed in legal intricacies may allow to go unchallenged for a long period of time.

Duchesne, 566 F.2d at 828 (internal cites and quotes omitted). See also Weller, 901 F.2d at 396. In this case, the motion for reconsideration was initiated by Mr. Egervary and the Hungarian custody proceedings were initiated by Ms. Kovacs.

Additionally, neither the motion for reconsideration nor the custody proceedings were sufficiently prompt to satisfy due process. Although there is no bright-line rule for deciding whether a postdeprivation custody hearing is sufficiently prompt, a survey of the case law shows that the delay should be measured in hours and days, not weeks and months.[8] See Jordan, 15 F.3d at 350-52 (approving of a state statute that provided for postdeprivation custody hearings "as soon as possible, but in no event later than seventy-two

---

[8] In considering the promptness of postdeprivation custody hearings, courts have taken guidance from the Supreme Court's decisions in Gerstein v. Pugh, 420 U.S. 103 (1975), and County of Riverside v. McLaughlin, 500 U.S. 44 (19911 See Jordan, 15 F. 3d at 349 (applying Gerstein and McLaughlin); Duchesne, 566 F.2d at 828 n.24 (applying Gerstein). In Gerstein, the Court held that the Fourth Amendment requires a prompt judicial determination of probable cause as a prerequisite to any extended pretrial detention of an individual suspected of a crime. In McLaughlin, the Court applied Gerstein and found that such hearings must take place within 48 hours of the arrest, absent some "extraordinary circumstance." McLaughlin, 500 U.S. at 57.

hours" after the child's removal); Campbell v. Burt, 949 F. Supp. 1461, 1468 (D. Haw. 1996) (holding that a postdeprivation hearing one week after the state takes custody violates due process); Lossman, 707 F.2d at 290 (approving of a postdeprivation hearing that occurred eight days after the state took custody, but noting that the hearing had been scheduled to occur earlier, but the parent requested additional time for preparation); Weller, 901 F.2d at 396 (holding that a postdeprivation hearing four months after the state takes custody violates due process); Duchesne, 566 F.2d at 826 (holding that a postdeprivation hearing twenty-seven months after the state takes custody violates due process).

In this case, both of the alleged postdeprivation hearings happened well outside of the constitutionally permissible time frame. The motion for reconsideration was filed approximately two weeks after Oscar was returned to Hungary. See Docket for In re Oscar Jonathan Egervary, No. 94-707, M.D. Pa. 1994. Oral arguments on that motion occurred more than two months later on July 25, 1994. Id. As of December, approximately seven months after Oscar was taken from Mr. Egervary's custody, the motion remained undecided and the case was "closed for statistical purposes." See Order by Judge Nealon dated December 23, 1994 (dismissing the case "for statistical purposes" and without prejudice in light of the Hungarian proceedings). Such a timetable is typical when federal courts deal with complex motions. Nonetheless, seven months is not sufficiently prompt for due process purposes.

The Hungarian custody proceedings were even less prompt. The record shows that Mr. Egervary had no notice of the Hungarian proceedings until approximately a month after Oscar was taken from his custody. See Egervary Dep. at 85. A hearing in the matter was later scheduled for January 1995. See Letter from Gary L. Azorsky, Esq. to Judge Nealon dated December 19, 1994 at 2. The Hungarian

courts did not resolve the issue until a final divorce decree between Mr. Egervary and Ms. Kovacs was entered in April 1996, nearly two years after Oscar was returned to Hungary. See Egervary Dep. at 18-19.

Defendants rely on Dincer v. Dincer, 701 A.2d 210 (Pa. 1997), in an attempt to show that plaintiff was afforded "full due process" in the Hungarian proceedings. See Nallin Mem. at 11. This reliance is misplaced. In Dincer, a mother brought her three children from Belgium to Montgomery County, Pennsylvania, ostensibly so that the children could visit their grandparents. Approximately two weeks after their arrival, the mother filed for custody of the children in Pennsylvania state court. Shortly thereafter, the father, who had remained in Belgium, filed for custody in the courts of that nation. The mother received notice of the Belgian proceedings, but failed to appear. The Belgian courts then awarded custody to the father. The mother nonetheless pressed the Pennsylvania court to award custody to her. The Pennsylvania court refused, finding that the Belgian custody order must be given comity because Belgium was the children's "home state" under the UCCJA. Id. at 321. In affirming the trial court, the Pennsylvania Supreme Court stated in dicta that the mother had been afforded due process in Belgium because she received notice and opportunity to be heard. Id.

The differences between this case and Dincer are obvious. In Dincer the state never took custody of the children; therefore, no postdeprivation hearing was possible or necessary. While the mother surely acted improperly by bringing the children here under false pretenses, as a private party her actions were beyond the reach of the Due Process Clause.[9] Moreover, the Dincer Court found that the mother

---

[9] Her actions were also beyond the reach of ICARA because Belgium is not a signatory to the Hague Convention. See Dincer v. Dincer, No. 94-24367, slip op. at 14-15 (Court of Common Pleas of Montgomery County, Pennsylvania April 15, 1998).

had been afforded due process in the Belgian proceedings because she had received notice and opportunity to be heard. Id. It is undeniable that the plaintiff received neither in this case. Dincer therefore does nothing to undermine the conclusion that plaintiff was denied a prompt, state-initiated and constitutionally adequate postdeprivation hearing in this case.

C. Defenses

Although the previous analysis leads to the conclusion that defendants violated plaintiffs due process rights, defendants make four arguments against holding them liable in a Bivens suit. Defendants argue that: 1) plaintiff waived his constitutional claim by withdrawing the motion for reconsideration before Judge Nealon; 2) plaintiff suffered no compensable damages; 3) plaintiff impermissibly seeks to collaterally attack the May 13th Order; and 4) courts have been "reluctant" to impose liability upon individuals participating in the return of kidnaped children. None of these arguments is persuasive.

1. Waiver

Defendants first argue that plaintiff waived his constitutional claim because he "withdrew" his motion for reconsideration of the May 13th Order. See Rooney Mem. at 6; Nallin Mem. at 2. The Court rejects this argument because there is an issue of fact as to whether plaintiff withdrew the motion, and even if he did, as a matter of law the withdraw did not waive his constitutional claim.

a. Waiver as an Issue of Fact

The starting point for defendants' waiver argument is the following factual claim:

> Although plaintiff filed a Motion for Reconsideration which was fully briefed, and ready for decision, plaintiff withdrew his motion and advised the Court he would prosecute his divorce and custody proceedings in Hungary. Plaintiff never requested that Judge Nealon reconsider, amend, vacate or in any way change his May 13, 1994 Order.

Rooney Mem. at 6 (emphasis added).

Defendants cite three pieces of evidence in support of this factual claim, but all three undermine defendants' argument. See Nallin Mem. at 5-6. The first, the letter in which plaintiff allegedly withdrew the motion, ends with the following statement:

> [S]ince the issues regarding the propriety of Mrs. Kovacs' initial petition have now been fully briefed, I dutifully and respectfully invite Your Honor to grant Mr. Egervary's motion for reconsideration and order the immediate return of his child; in that event, the proper jurisdiction for ruling on the custody issue could be determined by the appropriate forum absent the unfair advantage obtained by Mrs. Kovacs through improper unilateral action.

See Letter from Gary L. Azorsky, Esq. to Judge Nealon dated December 19, 1994 at 2 (emphasis added). This passage directly contradicts defendants' claim that plaintiff "never requested that Judge Nealon reconsider, amend, vacate or in any way change his May 13, 1994 Order."

Defendants next cite the Order that Judge Nealon entered in response to that letter. See Nallin Mem. at 5. In that Order, Judge Nealon dismissed the case "for statistical

purposes" and specifically stated that the dismissal "shall not prejudice the rights of the parties to this litigation." See Order by Judge Nealon dated December 23. 1994. The Order therefore does not support the contention that plaintiff withdrew or waived his constitutional claim; rather, it obviously protected plaintiffs right to pursue a later remedy depending upon the outcome of the Hungarian proceedings. The fact that plaintiff chose to vindicate those rights in a Bivens suit, rather than by renewing the motion for reconsideration, is of no importance here.

Finally, defendants selectively quote from plaintiffs deposition testimony in an apparent effort to show that plaintiff admitted he withdrew the motion for reconsideration. See Nallin Mem. at 5. However, read as a whole, plaintiff made no such admission:

> Q: It is my understanding, correct me if I am wrong, that you withdrew your petition for reconsideration by Judge Nealon and told him that you were going to participate in the custody matter in the Hungarian Courts. Do you recall that?
>
> A: No. That's not my understanding.
>
> Q: What is your understanding?
>
> A: That I, through my attorney, asked Judge Nealon to put that in pending, or not to continue with that for the moment since he refused to order the child back to the United States.
>
> Q: Did you tell him that you were going to, through your attorney did you tell the court that you were going to litigate the issue of custody of the child in Hungary?

A: I don't recall that, whether we told him or not.

Q: Was that your intention at that time that you were going to litigate custody in Hungary?

A: Not really my intention, but I didn't see anything else to do. Had I didn't [sic] go there I felt that I might have a chance, that I have no way of getting any kind of custody of Oscar.

Q: Well, what was your intention when you discontinued the proceedings before Judge Nealon?

A: My understanding is that I didn't discontinue. We just put it on hold.

See Egervary Dep. at 21-22.

The only reasonable interpretation of these facts directly contradicts defendants' factual claim. Plaintiff did not withdraw his motion for reconsideration or waive his constitutional claim. Rather, in deference to Judge Nealon's concern that the Hungarian proceedings might moot the motion for reconsideration - and in an effort to get his son back as quickly and cost-effectively as possible - plaintiff consented to Judge Nealon "put[ing] it on hold." These facts do not support summary judgment.

b. Waiver as a Matter of Law

The Court also concludes that even if the waiver defense could be factually supported at trial as a matter of law it does not defeat plaintiffs Bivens claim.

In Stanley v. Illinois, 405 U.S. 645 (1972), the Court considered and rejected a similar waiver claim in a similar context. In Stanley, an unwed father claimed that he had

been denied due process when his children were declared wards of the state after the death of their mother. The procedure used by the Illinois courts effectively presumed that Stanley was an unfit parent because he was never wed to the children's mother, but gave him the opportunity to regain custody of his children through separate guardianship or adoption proceedings. The state contended that the availability of those separate proceedings, and Stanley's failure to avail himself of them, defeated his due process claim. The Court rejected that argument and refused to "embrace[] the general proposition that a wrong can be done if it can be undone." Id. at 647. The Court rejected that argument because there is a "delay between the doing and the undoing," the unwed father would have different legal burdens in the later proceedings, and the later proceedings might be futile. Id. at 647-48.

Defendants' waiver argument is essentially the same argument Illinois made in Stanley, and it fails for the same reasons. Like Illinois, defendants argue that their violation of plaintiff s due process rights should be excused because plaintiff failed to take steps that supposedly would have cured the violation. As in Stanley, however, the motion for reconsideration would not have cured the injury that was done to plaintiff. Even if the motion for reconsideration was successful, it would have unnecessarily separated plaintiff from his son for an unjustifiable period of time, thereby "delaying] the doing and the undoing." Cf, Stanley, 405 U.S. at 647. The motion for reconsideration also shifted the legal burden off of Ms. Kovacs and onto Mr. Egervary. In an ICARA hearing, the petitioner (here, Ms. Kovacs) has the burden of proving the essential elements of her claim by a preponderance of the evidence. See 42 U.S.C. § 11603(e)(l)(A). In a motion for reconsideration, the burden is on the movant (here, Mr. Egervary) to show "manifest" errors of law or fact or new evidence. See generally Harsco Corp. v. Zlotnicki, 779 F.2d 906, 909 (3d Cir. 1985). Moreover, even if plaintiff had succeeded on his motion for

reconsideration, it probably would have been futile. It is unclear whether under international law Judge Nealon could have ordered Oscar's return to this country. Even if he did, it is possible that Ms. Kovacs would have defied the Order and hid Oscar within Hungary, as it is alleged she did once before. See Egervary Aff.¶8. This possibility is all the more likely since the Court's contempt powers -the only possible way of enforcing such an Order - are virtually meaningless to a foreign national with no property in this country and no intention of returning here. In other words, once plaintiffs due process rights were violated, the harm could not be undone. Plaintiff should not be penalized for allegedly failing to ask for the undoing.

Other courts faced with due process claims arising from child custody disputes have reached the same conclusion. In Weller v. Dep't. of Soc. Servs., 901 F.2d 387 (4th Cir. 1990), a father brought a Section 1983 claim against state officials after custody of his son was transferred to his ex-wife without any notice or opportunity to be heard. The court first concluded that Weller had a protectable liberty interest in the care and custody of his son. Id. at 391. The court then concluded that since Weller was accused of physically abusing his son the state was permitted to take custody of the child without prior notice, but Weller was nonetheless entitled to a postdeprivation hearing "shortly after the removal of the child." Id. at 393. The state argued - like defendants in this case - that Weller effectively waived his due process claim because he failed to "invoke the power of the juvenile court to issue a remedial order on his behalf." Id. The court found that even if such a remedy were available it did not satisfy due process. Id. at 394.

Similarly, in Duchesne v. Sugarman, 566 F.2d 817 (2d Cir. 1977), a mother brought a Section 1983 claim after municipal welfare workers removed her children from her custody without notice or opportunity to be heard. Approximately twenty-seven months after the family had

initially been separated, the mother attempted to regain custody by instituting habeas corpus proceedings. Id. at 824. Ten days after the habeas petition was filed, the state sought judicial ratification of the removal for the first time by instituting neglect proceedings. Id. In the civil rights action, the state argued that the failure to give notice and opportunity to be heard was not constitutionally defective because the habeas corpus remedy was available to the mother at all times. Like Stanley and Weller. the Duchesne Court was unwilling to put the burden of correcting the due process violation on the party whose rights had been violated and found that the mother had a viable claim. Id. at 828.

The waiver defense therefore also fails as a matter of law.

2. Collateral Attack

Defendants next argue that plaintiffs claim fails because it is an impermissible collateral attack on the May 13th Order. See Rooney Mem. at 9.

The only case cited in support of this argument is Heck v. Humphrey, 512 U.S. 477 (1994). In Heck, the Supreme Court ruled that a prisoner cannot maintain a Section 1983 suit that calls into question the lawfulness of his criminal conviction unless the conviction has been "reversed on direct appeal, expunged by executive order, declared invalid by a state tribunal authorized to make such determination, or called into question by a federal court's issuance of a writ of habeas corpus." Id. at 487. The Court based its ruling on the principle that "civil tort actions are not appropriate vehicles for challenging the validity of outstanding criminal judgements." Id. at 486.

Defendants have offered no authority and no rationale for applying Heck to any action other than a civil action challenging a criminal conviction. The Supreme

Court has "long expressed [] concerns for finality and consistency" in criminal cases and has "declined to expand opportunities for collateral attack" in criminal cases. Id. at 485-86 (citing cases). The same is not true in civil cases, particularly where due process violations are at stake. A collateral attack is appropriate where "procedural defects are of sufficient magnitude to constitute a violation of due process, or, as sometimes more circularly put, where the defects are so unfair as to deprive the proceedings of vitality." Fehlhaber v. Fehlhaber, 681 F.2d 1015, 1027 (5th Cir. 1982), quoting Windsor v. McVeigh, 93 U.S. 274 (1976) and Eagles v. United States, 329 U.S. 304 (1946).

Plaintiff has alleged serious due process violations that make a collateral attack appropriate in this case.[10]

3. Damages

Defendants next argue that plaintiff cannot sustain his claim because he has suffered no compensable damages. Specifically, they claim that the only inquiry relevant to the question of damages is "whether plaintiffs son, Jonathan,[11] would have been returned to his mother in Hungary regardless of the actions of the U.S. Department of State or any of the defendants." NallinMem. at 13.

The Supreme Court considered the availability of damages for due process violations in Carey v. Piphus, 435 U.S. 247 (1978). In Carey, a group of elementary and

---

10 The Court notes that it is unclear whether plaintiffs due process claim is properly characterized as a collateral attack. A due process claim "does not depend upon the merits of claimant's substantive assertions." Carey v. Piphus, 435 U.S. 247, 266 (1978). Therefore, decision of this case in plaintiffs favor would not mean that the petition before Judge Nealon was incorrectly decided.

11 Defendants consistently refer to young Oscar in their briefs as "Jonathan," his middle name. Plaintiff points out that Oscar has never been referred to by his middle name, even in court documents. See Plaintiff s Mem. at 4 n. 1.

secondary students claimed they were suspended from school without due process and brought a Section 1983 suit seeking actual and punitive damages. The Court held that "[b]ecause the right to procedural due process is 'absolute' in the sense that it does not depend upon the merits of a claimant's substantive assertions, and because of the importance to organized society that procedural due process be observed ... the denial of procedural due process should be actionable for nominal damages without proof of actual injury." Id. at 266. Accordingly, damages in this case do not depend upon proof that the ICARA and custody proceedings would ultimately have resulted in Oscar's return to his mother in Hungary.[12] Plaintiff is at least entitled to an award of nominal damages, even if the result of the ex parte ICARA proceeding was "justified" and even if plaintiff "did not suffer any other actual injury."[13] Id.

---

12 Plaintiff has suggested that if he had been afforded due process in the ICARA proceedings Oscar's custody would have been decided in this country, and he would have been awarded permanent custody. It is unclear whether plaintiff could seek recovery for such consequential damages at trial. Proceeding on that theory would raise complex issues regarding the propriety of conducting a "trial within a trial," the sufficiency of arguably speculative evidence of what other courts "might have done," and jurisdictional questions regarding this Court's capacity to hear the merits of a custody claim. See generally Solomon v. Solomon, 516 F.2d 1018, 1024-25 (3d Cir. 1975) (discussing the domestic relations exception to federal subject matter jurisdiction). The Court therefore takes no position on the availability of consequential damages.

13 Defendants also argue that plaintiff is "unable to recover for any alleged emotional distress in the absence of supporting medical testimony as a matter of Pennsylvania law." Nallin Mem. at 14 n.4. In Carey, the Supreme Court specifically recognized the availability of damages for emotional distress in due process claims. See Carey, 435 U.S. at 263. To the extent that this case is a federal Bivens claim, Pennsylvania law is irrelevant to how those damages are assessed. However, if plaintiff s conspiracy claim is a state claim, Pennsylvania law will likely apply. The Court therefore takes no position on this issue.

4. Immunity for the Return of Kidnaped Children

Defendants' final argument is that "courts have been reluctant to impose liability upon those participating in judicial process to secure the return of kidnapped [sic] or abused children." Rooney Mem. at 8; Nallin Mem. at 12-13.

This argument ignores the substantial body of case law - cited throughout this Memorandum - in which courts have recognized claims against government agents who allegedly removed children from their parents' custody without due process. See Hollingsworth, 110 F.3d at 740; Jordan, 15 F.3d at 351; Welter, 901 F.2d at 396; Doe, 858 F.2d at 1329; Robison, 821 F.2d at 921; Hooks, 771 F.2d at 942-43; Lossman, 707 F.2d at 291; Duchesne, 566 F.2d at 829. Although these claims have not always succeeded, none failed because of the blanket immunity that defendants claim here.

Moreover, none of the four cases cited by defendants support blanket immunity for "those participating in judicial process to secure the return of kidnapped [sic] or abused children." In fact, none of the four even deals with the return of kidnaped children.

Callahan v. Lancaster-Lebanon Intermediate Unit 13, 880 F. Supp. 319 (E.D. Pa. 1994), was a Section 1983 suit brought by parents who were temporarily wrongly deprived of custody of their autistic son because of unsubstantiated allegations of child abuse based upon the results of a controversial testing procedure. The court entered summary judgment against the parents, finding that there was no violation of their due process rights. Id. at 332-33. However, in that case the child was allegedly in imminent threat of harmful sexual abuse and the parents received a state-initiated postdeprivation hearing within seventy-two hours. Id. at 333. When the state could not meet

its burden of proving abuse at that hearing, the child was immediately returned to his parents. Id. Callahan therefore reinforces the Court's previous analysis, and does not support the broad immunity that defendants claim.

In Lord v. Murphy, 561 A.2d 1013 (Me. 1989), a father in Kentucky brought a Section 1983 claim against social workers in Maine who failed to give him notice of his children's placement in foster care after their removal from their mother's home. The father alleged that the social workers ignored a custody decree that had been entered in his favor in Kentucky and therefore violated state and federal law. The majority did not address the question of immunity for the social workers. Instead, the court simply found that the state law violations alleged could not form the basis of a Section 1983 suit. Id. at 1017. Lord therefore adds nothing to this case since it is unquestionable that due process violations can form the basis of a Bivens suit.

In Cosner v. Ridinger, 882 P.2d 1243 (Wyo. 1994), a noncustodial father brought claims for intentional or negligent interference with parental rights, intentional infliction of emotional distress, and abuse of process against his ex-wife, her second husband, and her attorneys. The court held that Wyoming did not recognize the tort of interference with parental rights and that there was an insufficient factual underpinning for the emotional distress and abuse of process claims. Id. at 1249. Cosner therefore did not consider a due process claim and did not find the broad immunity that defendants argue for here.

Finally, in Offenhartz v. Cohen, 562 N.Y.S.2d 500 (1990), a 12-year-old brought claims against her mother's attorney after the mother attempted to abduct the child. The plaintiff claimed that the attorney had advised her mother to attempt the abduction. The court affirmed the dismissal of the claims against the attorney because there was no privity between the plaintiff and the attorney and therefore

there could be no negligence claim. The court further ruled that the attorney could not be held liable for aiding and abetting the mother's assault because he took no overt act in furtherance of the assault. The defendant attorney in Offenhartz was not accused - as here - of directly effectuating a violation of plaintiffs' due process rights.

None of these cases support defendants' claim of blanket immunity for individuals involved in judicial proceedings related to child custody disputes. The Court is sympathetic to the notion of protecting individuals who in good faith take reasonable steps to protect children from parents who threaten their well-being. That sympathy, however, must be weighed against the "absolute" right to procedural due process, see Carey, 435 U.S. at 266, and the serious allegations in this case, including the as-yet unproven allegation that officers of the Court misrepresented material issues of law and fact to a federal judge. With these factors in mind, the Court declines defendants' invitation to find blanket immunity for their actions.

IV. CONCLUSION

The essential facts regarding defendants' liability on the Bivens claim are not in dispute. However, plaintiff has not moved for summary judgment in his favor on that issue, and the Court cannot enter such an order sua sponte unless defendants have been given notice and an opportunity to brief the issue. See Otis Elevator Co. v. George Washington Hotel Corp., 27 F.3d 903, 910 (3d Cir. 1994). The Court will therefore order that defendants submit such briefing within 20 days.

An appropriate Order follows.

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

OSCAR W. EGERVARY : CIVIL ACTION
v. : No. 96-3039
FREDERICK P. ROONEY, ESQ., et al. :

O'Neill, J.

January 21, 2000

ORDER
[Entered January 21, 2000]

AND NOW this 21 day of January, 2000, in consideration of defendants' motion for summary judgment, and plaintiffs response thereto, and for the reasons set forth in the accompanying memorandum, it is hereby ORDERED that defendants' motion is DENIED. It is further ORDERED that defendants shall within 20 days submit briefs regarding the entry of summary judgment in favor of the plaintiff on the question of liability, and plaintiff may respond within 20 days thereafter.

/s/Thomas N. O'Neill, Jr., J.
THOMAS N. O'NEILL, JR., J.

PRECEDENTIAL

UNITED STATES COURT OF
APPEALS FOR THE THIRD CIRCUIT

Nos: 02-1284/2035/2066/2133

OSCAR W. EGERVARY
v.
VIRGINIA YOUNG; JAMES SCHULER; FREDERICK P. ROONEY, ESQUIRE; JAMES J. BURKE, ESQUIRE; JEFFREY C. NALLIN, ESQUIRE; JOHN DOES ONE-TEN

OSCAR W. EGERVARY
v.
VIRGINIA YOUNG; JAMES SCHULER; FREDERICK P. ROONEY, ESQUIRE; JAMES J. BURKE, ESQUIRE; JEFFREY C. NALLIN, ESQUIRE; JOHN DOES ONE-TEN

Virginia Young, James Schuler,
Appellants in No. 02-1284 & 02-2066

OSCAR W. EGERVARY,
Appellant in No. 02-2035
v.
VIRGINIA YOUNG; JAMES SCHULER; FREDERICK P. ROONEY, ESQUIRE; JAMES J. BURKE, ESQUIRE; JEFFREY C. NALLIN, ESQUIRE; JOHN DOES ONE-TEN
Frederick P. Rooney, Esquire, James J. Burke, Esquire,
Appellants in No. 02-2133

Appeal from the United States District Court
for the Eastern District of Pennsylvania
(D.C. Civil Action Nos.96-cv-03039)
District Judge: Honorable Thomas N. O'Neill, Jr.,

Before: SCIRCIA, Chief Judge, SLOVITER, NYGAARD, ROTH, MCKEE, RENDELL, BARRY, AMBRO, FUENTES, SMITH, CHERTOFF, FISHER, and ALDISERT*, Circuit Judges

ORDER
[June 15, 2004]

The petition for rehearing en banc filed by the Appellant/Cross-Appellee in the above-titled case having been submitted to the judges who participated in the decision of this court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for a rehearing, and a majority of the circuit judges in regular active service not having voted for a rehearing by the court en banc, the petition for rehearing is denied.

By the Court,

/s/ Jane R. Roth

Circuit Judge

Dated: June 15, 2004

---

* Honorable Ruggero J. Aldisert, Senior Third Circuit Judge, vote limited to panel rehearing only.

7 WEST M ORTON STREET
POST OFFICE BOX C
BETHLEHEM, PENNSYLVANIA 10815

IN THE UNITED STATES DISTRICT COURT FOR THE
MIDDLE DISTRICT OF PENNSYLVANIA

In Re the application of: OSCAR JONATHAN EGERVARY

Petitioner

ANIKO EGERVARY KOVACS

vs.

Respondent,

OSCAR WILLIAM EGERVARY.

CIVIL ACTION NO. 3:CV-94-0707
[Entered May 13, 1994]

WARRANT IN LIEU OF WRIT OF HABEAS CORPUS

The convention on the Civil Aspects of International Child Abduction, done at the Hauge on 25 Oct 1980 Article 7(b) International Child Abduction Remedies Act, 42 U.S.C. 11604

THE PEOPLE OF THE STATE OF COMMONWEALTH OF PENNSYLVANIA TO:

Any PEACE OFFICER within the Commonwealth of Pennsylvania

ORDER OF THE COURT

It appearing to the Court, from the filing of a petition for warrant in lieu of habeas corpus, that Oscar Jonathan Egervary, a person under the age of sixteen (16) years, is illegally held in custody, confinement or restraint by the respondent and/or Mr. And Mrs. Rudolph Tokic at Cranberry Creek Road 1, Box 319-B, Cresco, Pennsylvania, County of Monroe and that there is a reason to believe Oscar Jonathan Egervary will be carried out of the jurisdiction or suffer some irreparable injury; YOU ARE COMMANDED TO:

Take into protective custody and forthwith bring Oscar Jonathan Egervary before the Hon. _____, in the courtroom of United States District Court for the Middle District of Pennsylvania, Scranton, PA, or if the court is not in session and no other Judge is available, deliver Oscar Jonathan Egervary into the custody of the Juvenile shelter located at _____.

Court's Initial: _____

Take into protective custody and deliver Oscar Jonathan Egervary to Juvenile Shelter at _____ where he shall remain in custody until a hearing is scheduled, and said hearing to be done promptly.

Court's Initial: _____

Take into protective custody OSCAR JONATHAN EGERVARY and release OSCAR JONATHAN EGERVARY to Petitioner or her agent. Petitioner is ordered to immediately calendar a hearing in the courtroom United States District Court for the Middle District of Pennsylvania, Scranton, PA. Petitioner or her agent shall not remove

Oscar Jonathan Egervary from the County of Monroe pending further action of the court.

Court's Initial: _____

Take into protective custody OSCAR JONATHAN EGERVARY and deliver him to Petitioner's agent for immediate return to the physical custody of Petitioner.

Court's Initial: /s/ _____
U.S. District Judge

AUTHORITY TO SEARCH PREMISES

This order gives any peace officer within the Commonwealth of Pennsylvania the authority to search the premises at Cranberry Creek Road 1, Box 319-B, Cresco, Pennsylvania, 18326 or any other place where Oscar Jonathan Egervary is reasonably believed to be present, for the purpose of determining whether Oscar Jonathan Egervary is present.

Supreme Court, U.S.
FILED
DEC 10 2004
OFFICE OF THE CLERK

(2)

No. 04-356

In the Supreme Court of the United States

OSCAR W. EGERVARY, PETITIONER

v.

VIRGINIA YOUNG, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENTS IN OPPOSITION

PAUL D. CLEMENT
Acting Solicitor General
Counsel of Record

PETER D. KEISLER
Assistant Attorney General

BARBARA L. HERWIG
MATTHEW M. COLLETTE
Attorneys

Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

QUESTION PRESENTED

Whether the court of appeals correctly determined that petitioner could not establish an essential element of his claim because he could not demonstrate that a district court's decision to permit the removal of his child without the opportunity for a hearing was proximately caused by the actions of the respondents.

TABLE OF CONTENTS

	Page
Opinions below	1
Jurisdiction	1
Statement	2
Argument	10
Conclusion	17

TABLE OF AUTHORITIES

Cases:

Barts v. *Joyner*, 865 F.2d 1187 (11th Cir.), cert. denied, 493 U.S. 831 (1989)	13
Berg v. *County of Allegheny*, 219 F.3d 261 (3d Cir. 2000), cert. denied, 531 U.S. 1072 (2001)	16
Bivens v. *Six Unknown Named Agents*, 403 U.S. 388 (1971)	2
Blum v. *Yaretsky*, 457 U.S. 991 (1982)	16
Duncan v. *Nelson*, 466 F.2d 939 (7th Cir.), cert. denied, 409 U.S. 894 (1972)	13
Gutierrez-Rodriquez v. *Cartagena*, 882 F.2d 553 (1st Cir. 1989)	12
Hand v. *Gary*, 838 F.2d 1420 (5th Cir. 1988)	13
Heck v. *Humphrey*, 512 U.S. 477 (1994)	12
Kalina v. *Fletcher*, 522 U.S. 118 (1997)	12
Malley v. *Briggs*, 475 U.S. 335 (1986)	14
Marshall v. *Perez Arzuaga*, 828 F.2d 845 (1st Cir. 1987), cert. denied, 484 U.S. 1065 (1988)	12
Monroe v. *Pape*, 365 U.S. 167 (1961)	12
Robinson v. *Maruffi*, 895 F.2d 649 (10th Cir. 1990)	13
Smiddy v. *Varney*, 665 F.2d 261 (9th Cir.), cert. denied, 459 U.S. 829 (1982)	13
Townes v. *City of New York*, 176 F.3d 138 (2d Cir.), cert. denied, 528 U.S. 964 (1999)	13

Constitution, treaty, statutes, regulations and rules :	Page
U.S. Const. Amend V	6
Hague Convention on the Civil Aspects of International Child Abduction, done on, Oct. 25, 1980, T.I.A.S. No. 11670, 1303 U.N.T.S. 89	2
Art. 6, T.I.A.S. No. 11,670	3
International Child Abduction Remedies Act, 42 U.S.C. § 11601 *et seq.*	2
42 U.S.C. 11603	2
42 U.S.C. 11606	3
28 U.S.C. 1292(b)	8
42 U.S.C. 1983	11
22 C.F.R.:	
Section 94.2	3
Section 94.3	3
Section 94.5	3
Section 94.6	3
Sup. Ct. R.:	
Rule 14(1)(a)	11
Rule 24(1)(a)	11
Miscellaneous:	
51 Fed. Reg. 10,498 (1986)	2
Restatement (Second) of Torts 2d (1965)	13

In the Supreme Court of the United States

No. 04-356

OSCAR W. EGERVARY, PETITIONER

v.

VIRGINIA YOUNG, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1-A25) is reported at 366 F.3d 238. The opinion of the district court (Pet. App. D1-D104) is reported at 159 F. Supp. 2d 132.

JURISDICTION

The judgment of the court of appeals was entered on April 30, 2004. Pet. App. A1. A petition for rehearing was denied on June 15, 2004 (Pet. App. G1). The petition for a writ of certiorari was filed on September 13, 2004. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

This is an action under *Bivens* v. *Six Unknown Named Agents*, 403 U.S. 388 (1971), arising from an international child custody dispute. Petitioner alleges that three private attorneys violated his due process rights by requesting and executing an *ex parte* order, issued by a federal district court, for the removal of his child. He also alleges that the federal respondents, two Department of State employees implementing the Government's responsibilities under the Hague Convention on the Civil Aspects of International Child Abduction (Hague Convention), *done on* Oct. 25, 1980, T.I.A.S. No. 11,670, 1343 U.N.T.S. 89, 51 Fed. Reg. 10,498 (1986), violated his due process rights by encouraging or aiding the private attorneys in this endeavor. The court of appeals held that summary judgment in favor of all respondents was appropriate because their actions did not proximately cause petitioner's deprivation of due process; rather, the erroneous, *ex parte* order issued by the court was an independent, superseding cause of the deprivation.

1. The Hague Convention, implemented in the United States by the International Child Abduction Remedies Act (ICARA), 42 U.S.C. 11601 *et seq.*, requires that a child who is removed in violation of the custody rights of a parent or another person be returned promptly to the child's habitual residence, regardless of the child's nationality. State and federal district courts have concurrent jurisdiction over claims arising under the Hague Convention and are empowered to order the return of abducted children. 42 U.S.C. 11603.

Both the Hague Convention and the ICARA require the designation of a "Central Authority" to discharge the duties of the United States under the Convention.

Hague Convention, Art. 6; 42 U.S.C. 11606. The Central Authority for the United States is the Bureau of Consular Affairs in the Department of State. 22 C.F.R. 94.2. Consular Affairs cooperates with the Central Authorities of other countries who are parties to the Hague Convention and with appropriate state authorities "to secure the prompt location and return of children wrongfully removed to or retained in" any country subject to the Convention. 22 C.F.R. 94.3.

The Central Authority accepts applications for assistance "in locating a child, securing access to a child, or obtaining the return of a child that has been removed or retained in breach of custody rights." 22 C.F.R. 94.5. It also assists applicants by confirming or seeking to ascertain the child's location and welfare; seeking through appropriate authorities a voluntary agreement for suitable visitation rights; assisting applicants in securing information useful for choosing legal representation; and monitoring all cases in which assistance has been sought. 22 C.F.R. 94.6.

2. Petitioner emigrated to the United States from Hungary in 1980 and became a U.S. citizen in 1987. He married Aniko Kovacs, a Hungarian national then residing in the United States, in 1991. Their son, Oscar Jonathan Egervary, was born on July 4, 1992. Petitioner claims that Kovacs traveled to Hungary with Oscar in February 1993 and later separated from petitioner and stayed in Hungary with the child. Petitioner subsequently located Kovacs and the child, and took Oscar from Kovacs and returned to the United States. Pet. App. A4, D4.

In April 1994, at Ms. Kovacs' request, the Government of Hungary transmitted an application to the Department of State under the Hague Convention, seeking the return of Oscar to Ms. Kovacs. Pet. App. A5.

The application stated that the father had forcibly abducted the child from Ms. Kovacs in the child's habitual residence in Hungary and removed him to Monroe County, Pennsylvania. *Id.* at A4; C.A. App. 570, 584.

Respondent Virginia Young, then an official in the Child Custody Division of the Office of Citizens Consular Services, called respondent Frederick Rooney, an attorney practicing near Monroe County, Pennsylvania, to inquire whether he would be willing provide legal representation to Ms. Kovacs in a petition for return of the child pursuant to the Hague Convention. Rooney accepted the representation, and Young thereafter forwarded to Rooney various materials, including Hungarian custody orders, letters from the Hungarian government, and the Hungarian government's petition invoking the Hague Convention. Pet. App. A4-A5.

Young also referred Rooney to model legal pleadings and forms concerning petitions under the Hague Convention and ICARA, published by the American Bar Association (ABA). Pet. App. A5. Those pleadings included a "Petition for Return of Child to Petitioner," which contained a paragraph stating that the respondent shall be given notice of hearings in the case. C.A. App. 587-590. Rooney ultimately filed a petition that included that paragraph. *Id.* at 576-580.

Another model pleading, captioned "Warrant in Lieu of Writ of Habeas Corpus," contained three remedial options, requesting that the child be (1) brought before the court for an immediate hearing; (2) placed in a juvenile shelter until a hearing is "promptly" conducted; or (3) placed in the custody of the petitioner, who must "immediately" schedule a hearing and may not remove the child from the county. C.A. App. 591-592; Pet. App. A5. Rooney, along with his co-counsel James Burke, prepared a Warrant in Lieu of Writ of Habeas Corpus

that contained the three options contained in the model pleadings. Rooney also added an additional, fourth option, which provided: "Take into protective custody Oscar Jonathan Egervary and deliver him to Petitioner's agent for immediate return to the physical custody of Petitioner." Pet. App. A5; C.A. App. 586. Rooney did not rely upon the advice of anyone at the Department of State when he included the fourth option, and does not recall informing anyone at the State Department of the option prior to filing the petition. *Id.* at 526, 536. Rooney stated in his deposition that he included the fourth option based upon his belief that the courts in Hungary had awarded custody to Ms. Kovacs, and therefore the petition sought merely to enforce an existing Hungarian court order. *Id.* at 536.

Rooney and Burke filed the Petition and Warrant in the United States District Court for the Middle District of Pennsylvania on May 13, 1994, and Rooney appeared for an *ex parte* conference with United States District Judge Nealon the same day. Pet. App. A5-A6, C.A. App. 202-203. During the meeting, Judge Nealon expressed some concern about authorizing the child's immediate removal from the United States (as provided by Rooney's fourth option) without first providing petitioner an opportunity to be heard. Pet. App. A6; C.A. App. 538, 540-542. He asked Rooney to check with the Department of State to determine whether the Department believed that a child may be returned in such a manner. *Ibid.*

During a break in the meeting, Rooney called the Department of State and spoke to an employee, respondent James Schuler, and stated that the judge "appears to be willing to sign an order for the child to be returned, but he wants to just be sure that that's within his authority." C.A. App. 538. Schuler replied (as

paraphrased by Rooney): "he's the judge. He's got the authority to make whatever decision he wants." *Id.* at 538, 542; Pet. App. A6.

Rooney then reported to Judge Nealon that the Department of State agreed that the judge had authority to order the immediate return of the child. Pet. App. A6; C.A. App. 620. Judge Nealon signed the order, electing the fourth option that provided for immediate return of the child. Rooney and Burke thereafter went to the United States Marshal's office for assistance in executing the order. Rooney and Burke accompanied the Marshals to petitioner's home, where the Marshals retrieved the child. Pet. App. A8.

Rooney then directed an associate in his office, Lori Mannicci, to make travel arrangements to return the child to Europe. Because Rooney did not have Oscar's passport, his associate contacted the Department of State Office of Passport Services to arrange for a passport waiver. After obtaining the passport waiver, Rooney took the child to Frankfurt, Germany, where Kovacs was waiting for them. Pet. App. A8.

Following Oscar's removal, petitioner filed a motion for reconsideration of the district court's *ex parte* order. He subsequently withdrew the motion, however, choosing to litigate custody in the Hungarian courts. Pet. App. A8.

3. Petitioner brought this action in the United States District Court for the Eastern District of Pennsylvania, naming as defendants the three attorneys who represented his ex-wife (Rooney, James Burke, and their local counsel Jeffrey C. Nallin), and the federal respondents, Young and Schuler. The complaint alleged that the respondents had conspired to deprive petitioner of his due process rights under the Fifth Amendment by obtaining a court order for the removal

of his son without notice and an opportunity for a hearing.

After venue was transferred to the Middle District of Pennsylvania, the district court granted the federal respondents' motion to dismiss the complaint, finding that petitioner did not allege that the *ex parte* nature of the court proceeding was in any way directed by, approved of, or within the knowledge of the federal respondents. Petitioner thereafter successfully moved to transfer venue back to the Eastern District of Pennsylvania. Pet. App. A9.

The case against the three attorney defendants was then assigned to a new judge, and discovery was conducted without the presence of the federal respondents. In an August 2000 ruling, the district court granted summary judgment for respondent Nallin, concluding that he was not acting as a federal agent because he did not participate in the execution of the ex parte order. Pet. App. A10, E9. The court concluded, however, that because respondents Rooney and Burke participated in execution of the order, they were acting as federal agents and could be subject to *Bivens* liability. *Id.* at A10, E9-E10. The court then concluded that the "good faith" defense raised by Rooney and Burke could not be resolved at the summary judgment stage, but instead presented a jury question to be resolved at trial. *Id.* at A10, E12-E13. In a footnote to its opinion, the district court stated that if the claim "that the State Department suggested Oscar could be returned to Hungary after an *ex parte* hearing is correct, then Young and Schuler bear a great deal of responsibility for the violation of [petitioner's] constitutional rights, even if they cannot be held accountable in these proceedings." *Id.* at E3 n.2.

In February 2001, petitioner moved to amend his complaint to add Young and Schuler as defendants in the case, alleging that they conspired to deprive petitioner of his due process rights by seeking an order removing his son without a hearing. C.A. App. 198-209. The district court granted petitioner leave to amend his complaint without waiting for a response to the motion. Pet. App. A11-A12.

4. The federal respondents moved to dismiss the amended complaint, and later moved for summary judgment, arguing among other things that they are entitled to qualified immunity. The district court, in a lengthy opinion, indicated that it would deny both motions. Pet. App. D1-D104. On the issue of qualified immunity, the district court held that petitioner's due process rights were violated when his son was removed without either prior notice or a prompt, state-initiated post-deprivation hearing. *Id.* at D57-D60. The court then concluded that petitioners' right to due process was clearly established at the time of the alleged violation, citing cases involving allegations that state officials removed a child from a parent's custody without sufficient opportunity for a hearing, and holding that it is an "obvious inference" to apply the general due process right discussed in those cases to the federal respondents here. *Id.* at D61-D67. The district court then held that "a jury could reasonably conclude that the federal [respondents] conspired with, gave substantial assistance or encouragement to, and/or ordered or induced Rooney['s]" actions. *Id.* at D102.

The district court then certified a number of its orders for interlocutory appeal under 28 U.S.C. 1292(b), including the order denying summary judgment to the federal respondents, the order denying summary judgment to Rooney and Burke, and the order granting

summary judgment to Nallin. Pet. App. A12. The federal respondents thereafter filed a notice of appeal with respect to qualified immunity, and also sought permission to appeal the remainder of the district court's adverse order under Section 1292(b). Rooney and Burke also sought permission to appeal, and petitioner did the same with respect to the grant of summary judgment to Nallin. The court of appeals granted all of the requests for permission to appeal and consolidated the appeals. *Ibid.*

5. The court of appeals reversed the district court's denial of summary judgment to respondents Rooney, Burke, Young and Schuler, remanding with directions to enter summary judgment in their favor, and affirmed the grant of summary judgment in favor of respondent Nallin. Pet. App. A1-A25. The court of appeals concluded that it need not reach a number of defenses raised by respondents, including lack of venue, absolute and qualified immunity, and good faith, because "we conclude that Egervary, by failing to demonstrate proximate cause with respect to any defendant, has failed to establish an essential element of his claim." *Id.* at A14.

The court stated that it would "adhere to the well-settled principle that, in situations in which a judicial officer or other independent intermediary applies the correct governing law and procedures but reaches an erroneous conclusion because he or she is misled in some manner as to the relevant facts, the causal chain is not broken and liability may be imposed upon those involved in making the misrepresentations or omissions." Pet. App. A23. The court of appeals distinguished that circumstance from the situation presented in this case, "where the actions of the defendants, while clearly a cause of the plaintiff's harm, do not create liability be-

cause of the intervention of independent judicial review, a superseding cause." *Ibid.* The court explained:

> No statement or omission by [respondents] could possible have made the issuance of [the judge's] order appropriate. Rather, the judge's execution of an order permitting Oscar's removal from the United States without either a pre- or post-deprivation hearing amounted to an error of law for which the judge alone was responsible.

Ibid. The court therefore concluded "that where, as here, the judicial officer is provided with the appropriate facts to adjudicate the proceeding but fails to properly apply the governing law and procedures, such error must be held to be a superseding cause, breaking the chain of causation for purposes of § 1983 and *Bivens* liability." *Ibid.*

The court of appeals also observed that neither the district judge's error in granting the order nor the execution of the order left petitioner without a remedy. The court explained that petitioner could have pursued his motion to reconsider and appealed a denial of that motion. "A reversal by this Court then would have permitted [petitioner] to enlist the aid of the State Department in obtaining Oscar's return. [Petitioner] instead chose to withdraw his motion for reconsideration and pursue the *Bivens* claim. While it was clearly his right to do so, he is now left with the consequences of that decision." Pet. App. A24-A25.

ARGUMENT

The court of appeals held that, where a district court is provided with the appropriate facts upon which to render a decision, the independent decision by that court to issue an *ex parte* order depriving petitioner of

the custody of his child constituted a superseding cause that prevents the imposition of *Bivens* liability on the respondents accused of obtaining and executing the judicial order in question. That decision rests upon a fact-specific and proper interpretation of common law and does not warrant review by this Court.

1. The question presented as framed by petitioner is whether the court of appeals "properly extended absolute immunity" to the respondents in this case. Pet. i. Despite petitioner's repeated attempts to characterize the court of appeals' decision as an unwarranted "extension of absolute immunity" (see, *e.g.*, Pet. 9, 11, 12, 13), however, the court of appeals expressly declined to address whether any of respondents were entitled to absolute (or qualified) immunity. Pet. App. A13-A14. The court instead based its decision upon an application of common law principles of causation. *Id.* at A14-A24.

Significantly, petitioner makes no attempt to challenge the court of appeals' holding with respect to causation. Because the question of causation is distinct from the question of absolute immunity, petitioner's failure to present that issue in the petition is fatal. Sup. Ct. R. 14(1)(a) ("Only the questions set out in the petition, or fairly included therein, will be considered by the Court."); see Sup. Ct. R. 24(1)(a) (brief may not raise questions not presented in the petition for certiorari). Because the only question presented in the petition concerns an issue upon which the court of appeals did not rule, the petition should be denied.

2. Even if petitioner had presented a challenge to the court of appeals' determination with respect to causation, certiorari would not be warranted. Liability under *Bivens*, as under 42 U.S.C. 1983, is determined "against the background of tort liability that makes a man responsible for the natural consequences of his ac-

tions." *Monroe* v. *Pape*, 365 U.S. 167, 187 (1961). Thus, this Court has "examined common-law doctrine when identifying both the elements of the cause of action and the defenses available to state actors." *Kalina* v. *Fletcher*, 522 U.S. 118, 123 (1997); see *Heck* v. *Humphrey*, 512 U.S. 477, 483 (1994) (recognizing that the common law of torts provides the appropriate starting point for liability under Section 1983).

Applying common law principles of causation in traditional tort law, the court of appeals correctly found that an independent decision by a federal judge is a superseding cause that breaks the chain of causation. Pet. App. A23. The court of appeals made clear, however, that the decision of a judicial officer or independent intermediary does not break the chain of causation if the judge "is misled in some manner as to the relevant facts." *Ibid.* In this case, the purported misrepresentation involved purely a legal issue—whether, under any set of facts presented to the district court, "minimal due process required providing [petitioner] with an opportunity to be heard prior to [his child's] removal from the United States." *Id.* at A22. That determination was ultimately made by the judge, whose issuance of the order "amounted to an error of law for which the judge alone was responsible." *Id.* at A23. The court of appeals thus correctly concluded that the judge's independent legal conclusion broke the chain of causation.

The court of appeals' decision applied settled common law principles. First, an actor is responsible for consequences caused by "reasonably foreseeable intervening forces." *Gutierrez-Rodriguez* v. *Cartagena*, 882 F.2d 553, 561 (1st Cir. 1989) (quoting *Marshall* v. *Perez Arzuaga*, 828 F.2d 845, 848 (1st Cir. 1987), cert. denied, 484 U.S. 1065 (1988)). Second, however, an "intervening exercise of independent judgment" breaks the

causal chain. *Townes* v. *City of New York*, 176 F.3d 138, 147 (2d Cir.), cert. denied, 528 U.S. 965 (1999). Thus, "[a] superseding cause is an act of a third person or other force which by its intervention prevents the actor from being liable for harm to another which his antecedent negligence is a substantial factor in bringing about." Restatement (Second) of Torts 2d § 440 (1965).

Where the defendant misleads the decisionmaker with respect to the relevant facts, the intervening act of the decisionmaker is not truly an exercise of independent judgment, and therefore does not break the chain of causation. By contrast, where, as here, the alleged misconduct concerns a legal issue within the expertise of an Article III judge, the judge's decision is an independent act that breaks the causal chain. That distinction, which forms the basis of the court of appeals' decision, is consistent with the uniform decisions of the courts of appeals. See, *e.g.*, *Townes*, 176 F.3d at 147; *Robinson* v. *Maruffi*, 895 F.2d 649, 655-656 (10th Cir. 1990); *Barts* v. *Joyner*, 865 F.2d 1187, 1195 (11th Cir.), cert. denied, 493 U.S. 831 (1989); *Hand* v. *Gary*, 838 F.2d 1420, 1427-1428 (5th Cir. 1988); *Smiddy* v. *Varney*, 665 F.2d 261, 266-268 (9th Cir. 1981), cert. denied, 459 U.S. 829 (1982); *Duncan* v. *Nelson*, 466 F.2d 939, 943 (7th Cir.), cert. denied, 409 U.S. 894 (1972).

In this case, a private attorney presented four options to an experienced federal judge, three of which involved a prompt post-deprivation hearing. The judge, exercising his independent judgment, chose the fourth option at the urging of the private attorney, concluding that it was unnecessary to provide even a post-deprivation hearing in this case. The court of appeals' holding that the independent and purely legal conclusion of the district judge breaks the chain of causation is correct and does not warrant further review.

That conclusion is particularly true with respect to the federal respondents, who petitioner seeks to hold responsible for *two* legal judgments independent and removed from the their conduct. First, a private attorney (Rooney) used his own legal judgment in deciding to add a fourth option that eliminated a post-deprivation hearing. Second, an experienced federal judge exercised his authority under Article III of the Constitution and issued an *ex parte* order without a pre- or post-deprivation hearing.

3. Petitioner's contention (Pet. 13) that the court of appeals' decision is inconsistent with this Court's decision in *Malley* v. *Briggs*, 475 U.S. 335 (1986), is misplaced. In *Malley*, this Court held that a law enforcement officer who requested an arrest warrant when no reasonable officer would conclude that the affidavit established probable cause was not entitled to absolute immunity or to qualified immunity, even if the warrant is approved by the magistrate. *Id.* at 345-346. *Malley*'s rejection of absolute immunity is not controlling here. As discussed, the court of appeals did not hold that any of the respondents are entitled to absolute immunity, and did not purport to rule on the question of qualified immunity.

The causation issue upon which the court of appeals ruled in this case was not presented in *Malley*. As the Court stated, the petitioner in that case had "not pressed the argument that in a case like this the officer should not be liable because the judge's decision to issue the warrant breaks the causal chain between the application for the warrant and the improvident arrest." 475 U.S. at 344 n.7. In dictum, this Court then noted that the district court's "no causation" rationale "is inconsistent with our interpretation of § 1983," noting that "[s]ince the common law recognized the causal

link between the submission of a complaint and an ensuing arrest, we read § 1983 as recognizing the same causal link." *Ibid.*

As the court of appeals recognized (Pet. App. A18), the statement in *Malley* merely incorporates the common law "traditional tort concepts of independent, intervening cause." This Court recognized the direct causal link between a complaint and an ensuing arrest, and did not purport to establish standards by which common law principles must be applied in future cases under other circumstances respecting the quite different context of a legal argument to an Article III court concerning what process is due. The court of appeals' decision here is fully consistent with common law principles, recognizing that in the absence of a factual misstatement or undue pressure, an independent legal conclusion by an experienced Article III judge constitutes an intervening cause.

Moreover, this Court would need to extend *Malley* to apply it to the federal respondents. Those individuals made no direct request to the court and did not personally appear before the court that issued the order. Nor did they supervise Rooney in the decision to seek an *ex parte* order—indeed, the undisputed evidence shows that Rooney developed his strategy as a result of his independent judgment. C.A. App. 536. At no point did *Malley* suggest that a government official who does not seek an order or participate in the hearing can be held liable when a district court issues an order that violates the Constitution. Indeed, courts have recognized that a supervisor who requests that a warrant be obtained, but does not play a role in obtaining or executing the warrant, may not be held liable if the subordinate officer later obtains the warrant without showing probable

cause. *Berg* v. *County of Allegheny*, 219 F.3d 261, 274-275 (3d Cir. 2000), cert. denied, 531 U.S. 1072 (2001).

Nor is there any other basis upon which to conclude that two Department of State employees, who are not lawyers, should be personally liable for the independent legal conclusions of a private attorney and an experienced federal judge. Young contacted Rooney to inquire whether he would represent petitioner's ex-wife, referred Rooney to ABA model pleadings, and maintained some contact with Rooney during the process. Schuler is alleged to have stated to Rooney during a telephone call, during which he was not told that the hearing was *ex parte*, that the judge has "the authority to make whatever decision he wants." No clearly established law could put the federal respondents on notice that their actions would make them responsible for Rooney's independent decision to seek the removal of plaintiff's child without a hearing, as well as for the judge's independent decision to grant that request. *Blum* v. *Yaretsky*, 457 U.S. 991, 1004-1005 (1982) ("Mere approval of or acquiescence in the initiatives" of a private party is insufficient to make the private party's actions that of the Government.). Accordingly, even if one looks past the court of appeals' decision with respect to causation, certiorari is unwarranted with respect to the federal respondents because there is no basis upon which to deny those respondents qualified immunity.

The facts of this case are unfortunate, but they are also quite unusual. There are alternative grounds, such as qualified immunity, for reaching the result below that are not encompassed in the petition. This case is not an appropriate candidate for plenary review.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

PAUL D. CLEMENT
Acting Solicitor General

PETER D. KEISLER
Assistant Attorney General

BARBARA L. HERWIG
MATTHEW M. COLLETTE
Attorneys

DECEMBER 2004

(4)

No. 04-356

Supreme Court, U.S.
DEC 10 2004
OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

OSCAR W. EGERVARY,

Petitioner,

v.

VIRGINIA YOUNG; JAMES SCHULER; FREDERICK P. ROONEY, ESQUIRE; JAMES J. BURKE, ESQUIRE; JEFFREY C. NALLIN, ESQUIRE; JOHN DOES ONE-TEN,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF IN OPPOSITION OF RESPONDENTS FREDERICK P. ROONEY AND JAMES J. BURKE

JAMES W. GICKING
Counsel of Record
RICHARD A. KRAEMER
MARSHALL, DENNEHEY, WARNER, COLEMAN & GOGGIN
1845 Walnut Street
Philadelphia, PA 19103
(215) 575-2703

Counsel for Respondents Frederick P. Rooney and James J. Burke

191449

COUNSEL PRESS
(800) 274-3321 • (800) 359-6859

TABLE OF CONTENTS

Page

Table of Contents i

Table of Cited Authorities iii

Counterstatement of Facts 1

A. The enlistment of Mr. Rooney to assist in the return of the abducted child, and the Hungarian court order and other materials supplied to him by the State Department. .. 1

B. Mr. Rooney's preparation of the petition, and presentation to District Judge Nealon. 7

C. Counterstatement of the Proceedings. 13

1. The District Court's decision and issues raised by Respondents, including the insulating effect of Judge Nealon's discretionary, independent decision. .. 13

2. The Court of Appeals decision and issues raised by Respondents. 14

Contents

Page

Reasons for Denying the Petition 16

A. The writ should be denied since the Court of Appeals did not consider the issue of immunity, let alone "extend absolute immunity" to defendants, nor did it depart from established precedent in deciding that Mr. Egervary had failed to establish a *Bivens* claim. 16

B. The Third Circuit's decision is consistent with decisions involving "unconstitutional warrants prepared and submitted by the actors for approval" – the attorney defendants did not omit or misrepresent facts and the district judge plainly exercised his discretion in applying the law and selecting among the remedies presented. 18

C. Mr. Egervary was not left without a remedy in the underlying case and implying a *Bivens* action in this context will serve no policy of deterrence. 21

Conclusion 23

TABLE OF CITED AUTHORITIES

Page

Cases:

Adickes v. S. H. Kress & Co., 398 U.S. 144 (1970) 17

Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics, 403 U.S. 388 (1971) .... *passim*

Corr. Servs. Corp. v. Malesko, 534 U.S. 61 (2001) 14, 18, 21

Groh v. Ramirez, 540 U.S. 551, 124 S. Ct. 1284 (2004) 18, 19, 20, 21

Jordan v. Fox, Rothschild, O'Brien & Frankel, 20 F.3d 1250 (3d Cir. 1993) 13, 14

Malley v. Briggs, 475 U.S. 335 (1986) 18, 21, 22

Meyer v. Holley, 537 U.S. 280 (2003) 16

Office of Disciplinary Counsel v. Holston, 533 Pa. 78, 619 A.2d 1054 (1993) 22

Pennsylvania Dept. of Corrections v. Yeskey, 524 U.S. 206 (1998) 17

Richardson v. McKnight, 521 U.S. 399 (1997) 15, 18

Cited Authorities

	Page
Sosa v. Alvarez-Machain, __ U.S. __, 124 S. Ct. 2739 (2004)	18
Wyatt v. Cole, 504 U.S. 158 (1992)	15
United States Constitution:	
Fourth Amendment	19, 20
Statutes:	
42 U.S.C. § 1983	18
42 U.S.C. § 11606	1
Rules:	
Pa. R.P.C. 3.3(a)(1)	22
U.S. Sup. Ct. Rule 10	16
Other Authorities:	
22 C.F.R. § 94.2	2
22 C.F.R. § 94.4(a).	2
22 C.F.R. § 94.6	2

COUNTERSTATEMENT OF FACTS

A. The enlistment of Mr. Rooney to assist in the return of the abducted child, and the Hungarian court order and other materials supplied to him by the State Department.

In May 1994, the Department of State contacted Frederick P. Rooney, a solo practitioner in Bethlehem, Pennsylvania, and asked him to become involved, *pro bono publico*, in this international child abduction matter concerning the young Oscar Jonathan Egervary. [D-11, C.A. APP. 512 - C.A. APP. 513]. At the time, Mr. Rooney had some limited experience in domestic child abduction matters through work as an attorney with Legal Services in Lehigh County, Pennsylvania. Of the cases he had handled that required him to venture beyond the Lehigh Valley area, one concerned an abduction of a child to Tennessee; another, to Puerto Rico. [*Id.*] A year before the call from the State Department, Mr. Rooney had pursued an interest in the subject of international child abduction by attending a conference/seminar in Washington, D.C. sponsored by the United States Justice Department, State Department and the American Bar Association. The conference provided participants with information and materials including model pleadings under the Hague Convention on the Civil Aspects of International Child Abduction ("ICARA"). Following the conference, he agreed to put his name on a list of those willing to assist in such matters. [C.A. APP. 514].

The Hague Convention to which both the United States and Hungary are "Contracting States," calls for each to "designate a Central Authority" to discharge certain imposed duties. Hague Convention, Article 6; 42 U.S.C. § 11606. The Department of State serves that function in the United States.

22 C.F.R. § 94.2. The broad obligations of Central Authorities are described in Article 7 of the Convention and include "either directly or through any intermediary . . . tak[ing] all appropriate measures" to locate and prevent further harm to a "wrongfully removed" child and among other things, to "initiate or facilitate the institute of judicial proceedings" to return the child, to "provide or facilitate the provision of legal aid and advice, including the participation of legal counsel and advisors" and provide necessary "administrative arrangements . . . to secure the safe return of the child. . . ." Hague Convention, Article 7; 22 C.F.R. § 94.6. [D-9] The State Department is prohibited, by regulation, from directly acting "as an agent or attorney" in proceedings under the Convention. 22 C.F.R. § 94.4(a). [D-10].

In the May 1994 call to Mr. Rooney, Virginia Young from the State Department told him that the department had been contacted by the Hungarian Central Authority, informing the department that a child had been located in Monroe County and that "they were looking for somebody to assist in the return of the child to Hungary." [C.A. APP. 524]. Ms. Young provided Mr. Rooney with copies of orders and other documents from the Hungarian authorities, and through a series of phone calls and faxes, assisted him in preparing documents for filing an ICARA petition. [C.A. APP. 525]. The documents from Hungary Mr. Rooney relied upon included a letter from Ms. Young giving the background of the case, the "Hague application" of Ms. Kovacs, a translated Hungarian court order, and a letter from the Hungarian Ministry of Justice. The letter of Ms. Young informed Mr. Rooney that the child involved was almost two-years old, and:

> . . . according to the information we have, was quite brutally kidnapped by his father and brought

> to the U.S. The mother, your client-to-be, is a violin soloist in Budapest and the father in the U.S. is unemployed, so I'm sorry but it doesn't look like there's any money anywhere.
>
> The child was born in the U.S. but the family apparently decided to go back home, and apparently the father gave up [his] job and belongings to relocate. And then seems to have changed his mind. I figure the Hague applies in that the child lived a month or two longer in Hungary than he did in the U.S. and the information seems to indicate that Hungary has been established as the place of residence when the father did the kidnapping . . .

[D-11, D-12].

The December 22, 1993 Hungarian court order included in the materials—in translation—stated that the child Oscar Jonathan Egervary had been placed in the custody of Ms. Kovacs "by a temporary measure" and directed the return of the child by Mr. Egervary "within 3 days." The order referred to an earlier-filed petition of Ms. Kovacs to dissolve the marriage, and stated as grounds for the December 22, 1993 order that the couple "broke off their married life in the summer of 1993" and, the court order continued:

> since that time the child has been living under the custody of mother. Respondent [Mr. Egervary] threatened, several times, to take along the child abroad. . . . On December 18, 1993, respondent took away the child, by force, and took him along with him, and since that time he has [not] made

> any appearance. Petitioner has no knowledge of the whereabouts of the child. Petitioner submitted application for a temporary measure in which she requested to place the child with her. The application of petitioner is well-grounded. By the statement of her father and by the report made to the police, petitioner rendered it probable that respondent took along the child by force. . . .[1]

[C.A. APP. 581-83].

---

1. Mr. Egervary, when deposed, confirmed that the child was born in the United States on July 4, 1992 and lived in the United States for approximately 8 months, and approximately 10 months in Hungary before December 18, 1993. He also testified that when he moved with his wife to Hungary in 1993, they transported their belongings, including furniture and his car, that he took a job there as an English teacher in a music school where he worked from August until November 1993. The couple separated on September 1, 1993.

He also testified about the abduction saying that on December 19, 1993 he located his wife at the home of her parents, that this was her registered address as confirmed by the police, that he talked to her in an attempt to get her to return with him and with Oscar J. to the United States, but the attempt failed. He testified that he was then "playing" with the child and while holding him, Mr. Egervary's brother "got out of his car and approached us", he then testified as to the events that followed:

> Q. Which brother is this?
>
> A. George. And when my wife saw him she got very nervous and she said out loud, what do you guys want to do? Or something like that.
>
> Q. And then what happened?
>
> A. Then I had Oscar in my arms and I walked to my brother's car and I sat in the back seat with Oscar.

(Cont'd)

Mr. Rooney testified that he relied on this information, supplied by the State Department, in preparing the ICARA petition, including the statement that the child's "habitual residence" had been Hungary before being abducted by Mr. Egervary, that the child had been "wrongfully removed," that a Hungarian court had awarded custody to Ms. Kovacs, and that an appeal of that order had been taken by Mr. Egervary. Mr. Rooney testified that at the time he brought the petition to the district court, he had checked to see whether Mr. Egervary had made any claim of custody in Monroe County, finding none, he also confirmed that Mr. Egervary had not contacted the State Department concerning a claim of custody. [C.A. APP. 531-32; C.A. APP. 545-46]. Mr. Rooney testified about his understanding of the custody

---

(Cont'd)

Q. And what did your wife do?

A. She was screaming that they are kidnapping my son. Help. She was yelling for help.

Q. And what happened?

A. My brother sat in the driver's seat and start [sic] to drive away.

Q. What did your wife do?

A. Screaming and kind of jumped on the car, or tried to jump on the car.

Q. Do you recall your brother jamming on his brakes and reversing the car to knock your wife off the hood of the car?

A. Yes.

Q. Did he knock her off the hood of the car?

A. It wasn't a knock. She slid off.

[C.A. APP. 276-77].

issue at the time he presented the ICARA petition to the district court:

> the issue of custody was, had already been determined, at least temporarily, in Hungary and that Hungary was the jurisdiction that the issue of custody would need to continue to be litigated.
>
> [and this exchange followed]:
>
> Q. At the time that you were in court on May 13, 1994, did you know whether Mr. Egervary had ever been given any sort of notice of the orders entered in Hungary regarding temporary custody?
>
> A. I didn't, but I did know that he had been represented somehow in an appeal that was taken.
>
> Q. So you did not know whether he received notice of the orders that were taken; correct?
>
> A. I didn't know if he did, but I knew that somebody acting on his behalf had because he had an attorney representing him on the appeal of the December 23rd [1993] order.

[C.A. APP. 545-46 (pp. 145-46)].

B. Mr. Rooney's preparation of the petition, and presentation to District Judge Nealon.

The "model pleadings" which Mr. Rooney relied upon in representing Mrs. Egervary contained three options for effecting the return of the child, all suggesting an *ex parte* proceeding without notice to the "alleged parent-kidnapper followed by seizure of the child and a prompt post-deprivation hearing with notice." [D-13]. The first option ordered the child to be delivered to the court, or if no judge is available, to a juvenile shelter. The second option called for the child's delivery to a juvenile shelter "where he shall remain in custody until a [prompt] hearing is scheduled." The third option permitted release of the child to "petitioner or her agent" and called for the court to thereafter hold a hearing. [H-2; C.A. APP. 586]. Mr. Rooney drafted a fourth option to the petition, permitting delivery of the child to "Petitioner's agent for immediate return to the physical custody of Petitioner." [H-3; D-14 – D-15]. Mr. Rooney had added this provision with the understanding that it was appropriate under the circumstances suggested in the Hungarian court documents (as confirmed by information he received from the State Department) concerning a previous award of custody to Ms. Kovacs as well as the forceful seizure of the child from her and the divorce proceedings in Hungary. [C.A. APP. 536].

After drafting the petition, Mr. Rooney, accompanied by Mr. Burke, filed the petition in the Middle District and shortly afterwards met with Judge Nealon, who had been assigned the petition. Mr. Rooney recalled telling the judge how he became involved in the matter and when asked about his experience with ICARA cases, "I told him that I was more involved in domestic cases, but that I had been learning

about the Hague Convention and he was interested. . . ." Mr. Rooney testified about his understanding of the authority for the fourth option and presenting it to Judge Nealon:

> And the question of the return came about because in my opinion there had already been two hearings . . . in Hungary and since Hungary was a signatory to the Hague Convention, that order of the Hungarian courts deserved full faith and credit. I had been involved in domestic cases where the courts simply gave full faith and credit to a foreign order from another state and allowed for a child to be returned.

[C.A. APP. 540]. According to Rooney, Judge Nealon "was specifically concerned about whether he had the authority to allow the child to be returned." In order "to assure the judge that, in fact, my interpretation of his authority was correct, [Rooney] called Schuler [of the State Department] from [the judge's] chambers" during a break in meeting with the judge occasioned by an intervening conference. [D-16]. On further questioning at deposition, Mr. Rooney testified about Judge Nealon's concerns:

> Q: . . . What reservations did the judge express?
>
> A: I think he questioned whether or not he had the authority to order the return of the child, and I said all I could tell him is that in my experience in foreign jurisdictions, and I mean domestic foreign, not Pennsylvania, that under the UCCJA that with a certified copy of a court order that you could go from Pennsylvania to retrieve children in California with a certified Pennsylvania court

> order without having to invoke the whole process of hearings in California.

[D-15]. Mr. Rooney testified about the phone call he then made to the State Department, speaking to Mr. Schuler . . .

> I called Schuler from the Judge's chambers and I said, Jim, Judge Nealon appears to be willing to sign an order for the child to be returned, but he wants to just be sure that that's within his authority and Schuler said to me he's the judge. He's got the authority to make whatever decision he wants.

[D-16]. Mr. Rooney also testified that he discussed the other options requested in the petition with Judge Nealon:

> Q: And what was discussed during that second meeting in chambers with the judge?
>
> A: We talked about alternatives that he had under the order that I had presented, and that in instances children are taken into protective custody and that the child could have been held by social services in Monroe County. I don't remember what else could have been done right now, but that he could have gone into a juvenile shelter, that he could have been taken into protective custody.
>
> Q: And you described those alternatives to the judge?
>
> A: Correct.
>
> Q: And then what was said?

> A: Well, I remember the judge mentioning, it was Friday and it may have been difficult to get protective services in at that time, given the time of day or the fact that it was a Friday. That I remember. And I told him that I didn't know anyone else in the area. I didn't know if there was any other family members with whom the child could be left, and that given those circumstances, whatever his decision was I would abide by it and respect it, but I told him if the child, if he ordered the return of the child, that I would take the child to Hungary.

[D-17 – D-18].

Judge Nealon was deposed in the case and as the District Court (Judge O'Neill) summarized Judge Nealon's testimony:

> Judge Nealon's testimony agrees with much of Rooney's testimony, but it differs on a few key points. According to Judge Nealon, Rooney: 1) portrayed himself as representing the State Department;[2] 2) stated that he was seeking to have the Judge enforce a Hungarian court order; 3) had already made arrangements to return the child to Hungary that day; and 4) never suggested any remedy that would require Judge Nealon to conduct a hearing on the matter. . . .

---

2. Judge Nealon testified: "Well, in capsulizing what he told me and I have to use the word advisedly whether he said he was retained, I thought he said he was retained, at least that's the impression I got, by the State Department to present this petition. . . ." [C.A. APP. 96]

The district court also quoted this passage from Judge Nealon's deposition:

> A: And let me — I know the petition mentions hearings, but at no time did he suggest a hearing to me. I want to be empathic [sic] about that. That this — that while hearings may have been required in a normal kidnapping context, here was a court order out of Hungary and that he had been retained by the State Department to implement this and pick up this child and have her [sic] returned to Hungary. It was an interpretation of international law. And I remember being concerned about it and saying that I want to find out if this is the official State Department position. I don't have experience in these matters and I'm willing to take their representation if they say that no hearing is required, no notice is required, and that the child should be immediately picked up and turned over to Mr. Rooney for prompt return to Hungary.

[D-20].

The same day, Judge Nealon entered an order selecting the fourth option of relief and the order was enforced by the U.S. Marshals and Pennsylvania State Police. The child, Oscar J. Egervary, was delivered to Mr. Rooney who, after making arrangements with his office for a flight to Europe, promptly returned the child to the mother. Oscar W. Egervary thereafter obtained counsel and filed a motion for reconsideration of Judge Nealon's May 13, 1994 order. The motion for reconsideration was docketed on May 27, 1994, and the matter was briefed and scheduled for argument and argued on July 25, 1994. Briefs on additional issues were

requested by the court and were filed on August 2, 1994. After initially ordering a hearing for August 8, on August 11, 1994 Judge Nealon ordered the hearing indefinitely continued, apparently to allow for discussions between Mr. Egervary and Ms. Kovac about resolving custody.

Mr. Egervary's counsel's letter to Judge Nealon of December 19, 1994 advised the court that his client was participating in custody hearings in Hungary, with the result that "the proceedings before your honor may be rendered moot by the proceedings in Hungary." Mr. Egervary requested that the matter before Judge Nealon be placed in suspense:

> I recommend, and respectfully request, that your Honor place this action in the civil suspense docket until such time as the parties can better ascertain whether the Hungarian action is likely to be resolved in a timely fashion. If the Hungarian action continues to drag on without a discernible endpoint after several months, then I will contact Your Honor and request that this matter be returned to the active docket so that we may proceed with a hearing.

[C.A. APP. 347]. The letter requested the alternative relief of grant of the motion for reconsideration and order of the "immediate return of the child." [*Id.*]. The Hungarian courts ultimately awarded custody to Ms. Kovacs in May 1996. The complaint in this matter was filed in April 1996

C. Counterstatement of the Proceedings.

1. The District Court's decision and issues raised by Respondents, including the insulating effect of Judge Nealon's discretionary, independent decision.

Egervary's petition before this Court asserts that the Court of Appeals determined, "without benefit of consideration or analysis of the issue by the trial court," that the "'independent'" decision of Judge Nealon relieved Rooney and Burke of liability. [Statement of the Case at p. 7]. In a January 21, 2000 order, the District Court denied the "attorney defendants' " (Rooney's and Burke's) motion for summary judgment and directed further briefing on the issue of whether summary judgment should be granted on their liability to plaintiff under *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971). [F-1, F-37]. The District Court concluded that Rooney and Burke were "federal agents" under the "test of state action" applied in *Jordan v. Fox, Rothschild, O'Brien & Frankel*, 20 F.3d 1250 (3d Cir. 1993). [E-10]. In making this finding, the District Court rejected Rooney and Burke's argument that they were not federal actors because the *independent* exercise of discretion by Judge Nealon distinguished Egervary's case from *Jordan*, where the attorneys simply invoked a constitutionally-flawed confession of judgment procedure on behalf of their clients and it was issued by the ministerial act of the prothonotary. As the District Court acknowledged in explaining the decision in *Jordan*, the attorney defendants obtained judgment under that procedure from the prothonotary by presenting nothing more than a complaint, "'an instrument the defendant has signed authorizing judgment by confession and an actual confession of judgment signed by any attorney acting for the defendant.'" [E-7 n.4 quoting *Jordan*, 20 F.3d at 1262]. Notwithstanding Rooney

and Burke's arguments that the independent, discretionary act of Judge Nealon meant they could not be considered federal actors in obtaining and executing the judge's order, the District Court considered there was a "close analogy" between the *Jordan* private attorneys' obtaining judgment under this procedure and then setting execution of judgment "in motion" and Rooney and Burke's conduct in this case. [E-8 – E-9].[3]

2. The Court of Appeals decision and issues raised by Respondents.

Respondents Rooney and Burke also urged the Court of Appeals to accept that the District Court had erred when it ignored the fundamental difference between the independent exercise of discretion by Judge Nealon involved in this case, where private attorneys presented a petition under a constitutionally-valid treaty and asked for alternative relief, and the flawed procedure invoked by the attorney-defendants in *Jordan*. [Rooney and Burke's C.A. brief, p. 36].

Rooney and Burke also asked the Third Circuit to consider that the Supreme Court had never extended *Bivens* liability to private actors, and that it had cautioned, in *dictum*—in a decision decided after the District Court had found Rooney and Burke were "federal actors,"—that the Court had "consistently refused to extend *Bivens* liability to any new context or new category of defendants." *Corr. Servs. Corp. v. Malesko*, 534 U.S. 61, 66 (2001). [Rooney and Burke's C.A. brief at pp. 42-46]. They also argued that if they *were* held to be federal agents under *Bivens*, they were

3. However, the Court declined to enter summary judgment against these attorney defendants on the *Bivens* claims, deciding they would be entitled to assert a good faith defense at trial. [E-7 – E-10].

entitled not just to a good faith defense, but as attorneys offering their services to the government in fulfilling their obligations under the Hague Convention, to some version of immunity. [C.A. Brief at pp. 47-50]. Rooney and Burke argued that while the Supreme Court had foreclosed the availability of qualified immunity in the context of state replevin, garnishment or attachment statutes, *Wyatt v. Cole*, 504 U.S. 158, 168-69 (1992), the Court had left open the possibility that the defense was available to these private attorneys, stating that it had previously answered the immunity question "narrowly, in the context in which it arose." *Richardson v. McKnight*, 521 U.S. 399, 413-14 (1997) (denying immunity to private prison guards, "subject to ordinary competitive pressures" but not foreclosing immunity for "a private individual briefly associated with a government body . . . or acting under close official supervision."). Rooney and Burke also asked the Court of Appeals to consider, in connection with the grant of immunity to them in this context, that in *Richardson* this Court noted that the law had historically provided "for a kind of immunity for certain private defendants, such as doctors or lawyers who performed services at the behest of the sovereign." 521 U.S. at 407.

Rooney and Burke raised other issues concerning the failure of Egervary's proof which the Court of Appeals concluded it did not need to reach. Instead, the Court of Appeals held that Egervary had failed to establish a fundamental element of his *Bivens* claim of "proximate cause with respect to any defendant" based on the lack of any evidence that Respondents factually misled the court and the judge's independent exercise of discretion in applying the law. [A-14]. The Third Circuit also observed, without reaching the issue, that Judge Nealon testified that he believed Mr. Rooney (who drafted the petition and presented it) "acted in good faith and did not purposely mislead him." [A-20 n.6].

REASONS FOR DENYING THE PETITION

A. The writ should be denied since the Court of Appeals did not consider the issue of immunity, let alone "extend absolute immunity" to defendants, nor did it depart from established precedent in deciding that Mr. Egervary had failed to establish a *Bivens* claim.

Mr. Egervary has not presented a valid, let alone a compelling reason for this Court to grant his petition. Sup. Ct. Rule 10. While he asks this Court to review a decision of the Court of Appeals that purportedly "extended absolute immunity from damages liability to federal officers" under certain circumstances, his characterization is plainly inconsistent with that decision. The Court of Appeals explicitly declined to reach the issues of absolute immunity, qualified immunity or good faith to resolve Egervary's appeal and devoted no discussion to them. [A-14].[4] Therefore, although petitioner has suggested otherwise, the Third Circuit could not have "ignored" any well-established principle of immunity in its decision, nor could it have engaged in any "freewheeling expansion of absolute immunity" in deciding that the attorney defendants were entitled to summary judgment on the *Bivens* claims. [Petition at 8]. This Court should decline to grant this petition since the issues of immunity, while raised by defendants, were not addressed by the Court of Appeals and this issue did not directly or indirectly inform any of the reasoning of that court. *Meyer v. Holley*, 537 U.S. 280, 292 (2003) (Where the Court

---

4. Although the Court of Appeals observed that District Judge Nealon believed Rooney (who alone presented the subject petition to the District Court) "acted in good faith and did not purposely mislead" Judge Nealon. [A-20 n.6].

of Appeals has not considered a matter, "we shall not consider it".), citing *Pennsylvania Dept. of Corrections v. Yeskey*, 524 U.S. 206, 212, 213 (1998); *Adickes v. S. H. Kress & Co.*, 398 U.S. 144, 147 n.2 (1970).

And although Mr. Egervary argues otherwise, the Court of Appeals did not announce any novel legal principle nor did it "disregard fundamental precedent" in its decision. The circumstances in this case were accurately recounted by the Court and were not challenged by Egervary. Those facts demonstrated that defendant Rooney[5] presented a petition to a federal judge, that the petition and presentation included appropriate, accurate and non-misleading facts, that they were presented in connection with a valid procedure, and that the judge erred in applying the law to those facts when choosing among alternative relief requested by counsel. The Court of Appeals appropriately distinguished this circumstance—involving an error of the court in applying the law—from the circumstance in which a judicial officer "applies the correct governing law and procedures, but reaches an erroneous conclusion because he or she is misled in some manner as to the relevant facts" by counsel. [A-23]. In reaching this conclusion, the Court of Appeals recognized and did not depart from the "well settled principle" that when a misrepresentation or omission of fact has occurred, "the causal chain is not broken and liability may be imposed upon those involved in making the misrepresentations or omissions." *Id.* However, that was plainly not the circumstances of the petition presented to Judge Nealon. Therefore, the Third Circuit correctly concluded that these private attorney defendants could not be held liable under *Bivens* for the independent exercise of discretion by Judge Nealon in applying the law.

---

5. Defendant Burke did not participate in the presentation to Judge Nealon. [A-5 – A-8].

B. The Third Circuit's decision is consistent with decisions involving "unconstitutional warrants prepared and submitted by the actors for approval" – the attorney defendants did not omit or misrepresent facts and the district judge plainly exercised his discretion in applying the law and selecting among the remedies presented.

Petitioner argues that the Court of Appeals decision directly conflicts with a "pronouncement" in *dictum* in *Malley v. Briggs*, 475 U.S. 335 n.7 (1986), recently "confirmed" in *Groh v. Ramirez*, 540 U.S. 551 n.4, 124 S. Ct. 1284 (2004). [Petition at p. 7]. The Third Circuit's decision is consistent with *Groh* and *Malley*. This Court counseled, in a footnote in *Malley*, that 42 U.S.C. § 1983 should be read against the "background of tort liability" which recognizes a causal link—in a malicious prosecution claim—between the submission of a complaint and the resulting arrest. 540 U.S. 551 at n.7. The Third Circuit's analysis began with the assumption that *Bivens* actions are "simply the federal counterpart to § 1983 claims"[6] and as the footnote in *Malley* counseled, the Third Circuit looked to traditional tort concepts of causation for guidance and applied them to this *Bivens* claim. [A-14]. The Third Circuit considered that the "causal link" that is sufficient to impose liability in a

---

6. An assumption that this Court has observed may not be warranted with respect to the extension of such claims to "any new context or new category of defendants." *Correctional Services, Corp. v. Malesko*, 534 U.S. 61, 68, 67-70 (2001); *Sosa v. Alvarez-Machain*, ___ U.S. ___, 124 S. Ct. 2739, 2772 (2004) (Scalia, Concurring) . Compare *Richardson v. McKnight*, 521 U.S. 399, 403 (1997) (§ 1983 can "sometimes impose liability on a private individual"). To date, this Court has not decided whether a *Bivens* action might lie against a private individual.

malicious prosecution claim is misdirection, either by omission or commission, in the facts supporting the warrant or indictment that is "put before an impartial intermediary such as a magistrate or grand jury." [A-17, A-18]. On the other hand, where there is no factual misdirection, as in this case, the chain of causation may be broken by the "intervention of independent judicial review." [A-23]. So long as the judge has been presented with all the facts, and his or her decision is not tainted by some factual misdirection, the traditional tort concepts of independent, intervening cause will relieve the complainant from liability for a constitutional tort. [A-18]. The Third Circuit thus held:

> Where, as here, the judicial officer is provided with the appropriate facts to adjudicate the proceeding but fails to properly apply the governing law and procedures, such error must be held to be a superseding cause, breaking the chain of causation for purposes of § 1983 and *Bivens* liability.

[A-23].

Although Egervary suggests otherwise, there is no conflict between the Third Circuit's analysis of causation and this Court's decision in *Groh*. That decision involved a *Bivens* claim based on a search undertaken pursuant to a warrant which lacked particularity, a failing apparently resulting from a clerical error attributable to the ATF agent presenting the warrant. Far from imposing absolute liability on officials for executing an invalid search warrant, the Court looked to the factual representations made to the federal magistrate on the face of the warrant and the responsibility of the officials for these representations. The Court observed that the *Fourth Amendment*'s warrant requirement "interposed a magistrate between the citizen and the police" so that an "objective mind might weigh the need to invade" a citizen's privacy. 540 U.S. at __, 124 S. Ct. at 1291.

The magistrate's decision to approve the warrant would not exempt the search from the presumption that it was unreasonable, not because the Court discounted the exercise of *independent judgment* of the magistrate, but because of the incorrect description supplied in the warrant submitted for approval. Because of that factual error of description on the face of the warrant, there was no way to know whether the magistrate had *independently* "agreed that the scope of the search should be as broad as the affiant's request" in the accompanying application (supported by the agent's affidavit). *Id.* at 1292. Thus, since the restraints on the search could only be said to have been "'imposed by the agents themselves, not by a judicial officer,'" the search not only violated the *Fourth Amendment*, it made the ATF agents who were responsible—who caused a flawed warrant to be used for the search—liable for that unconstitutional search. *Id.* (citation omitted). So long as the actor was responsible for the factual error or misdirection, it will not be "reasonable for the petitioner to rely on a warrant that was so patently defective, even if the Magistrate was aware of the deficiency." *Id.* at n.4.

Thus, *Groh* applied the same principle found in the various decisions relied upon by the Third Circuit that a § 1983 or *Bivens* claim would only be established where some active or passive factual misdirection by a state or federal actor to a judicial officer was involved, and where it resulted in a constitutional violation.[7] A different set of circumstances, *Groh* plainly suggests, in which the defect in the warrant was purely the result of the magistrate's

---

7. This Court also concluded that an immunity defense was unavailable to the petitioner in *Groh* because he had prepared the invalid warrant himself. Under those circumstances he could, therefore, not have reasonably relied on any assurance from the magistrate that the "warrant contained an adequate description of the things to be seized and was therefore valid." 124 S. Ct. at 1293.

incorrect application of law to an accurate and complete set of facts, would necessarily lead to the analysis employed by the Third Circuit in Egervary's case and the finding of a break in causation. Therefore, neither *Malley* nor *Groh* nor any other decision cited by Egervary provides a valid reason for this Court to grant his petition based on a conflict with either decision. Nor did the Third Circuit's decision depart from established precedent in concluding that the conduct of these attorney defendants in presenting their petition to Judge Nealon was not the cause of Egervary's harm.

C. Mr. Egervary was not left without a remedy in the underlying case and implying a *Bivens* action in this context will serve no policy of deterrence.

As the Third Circuit also correctly noted, Mr. Egervary elected to participate in the custody proceeding in Hungary, already underway before this seizure occurred,[8] rather than to continue to pursue the post-seizure remedy he had started in this case of asking the District Court to reconsider the *ex parte* order. Had the District Court, in response to that motion, corrected its error and reversed its order he would have had the opportunity—as the Third Circuit suggests—to enlist the State Department in the return of young Oscar. [A-25]. Although these attorney defendants had argued to the Third Circuit that this course of action of pursuit of custody in Hungary and abandonment of a remedy in the District Court amounted to waiver of a *Bivens* claim, they also suggest something else: that there is no need to infer a *Bivens* claim "because the plaintiff lacked any other remedy for the alleged constitutional deprivation." *Malesko*, 534 U.S. at 67-68.

---

8. Mr. Egervary testified that he did not receive notice of this proceeding until after Oscar J. was returned to his mother in Hungary.

Egervary also insists that the supposed grant of "absolute immunity" by the Third Circuit to these attorney defendants will produce a number of dire consequences, including "incit[ing] abuse of authority as well as irresponsible lawyering." [Petition at 14]. As should be plain from its opinion, the Third Circuit did not grant any kind of immunity to these defendants and its ruling does not have the effect of relieving federal actors from responsibility for their conduct. Instead, the Third Circuit simply distinguished between the appropriate roles and responsibilities of judicial officers and attorneys; the former already immune for their actions, the latter continuing, consistent with established precedent, to be held fully responsible for any omission or commission of fact in their presentations to a judicial officer in this context.

Moreover, members of the bar have long been deterred from misconduct by the very real prospect of enforcement of professional rules, as this Court noted in *Malley* with respect to prosecutors. *Malley*, 475 U.S. at 343 n.5. The "organized bar's development of professional standards," *id*, that are enforceable against prosecutors apply equally to these attorney defendants and certainly lessen the potential for the abuses suggested by Egervary. *See, e.g., Office of Disciplinary Counsel v. Holston*, 533 Pa. 78, 82, 619 A.2d 1054 (1993) (upholding disciplinary board's sanction of disbarment for violation of Pa. R.P.C. 3.3(a)(1).

CONCLUSION

For the reasons stated in this response, and for the additional reasons explained by the Court of Appeals, Respondents Rooney and Burke respectfully request that this Court decline to grant the petition for writ of certiorari. Alternatively, should the Court conclude that the writ should be granted, Respondents request that this Court affirm on the ground that, as a matter of law, the undisputed facts demonstrate that these attorneys acted in good faith in the proceedings before Judge Nealon.

Respectfully submitted,

JAMES W. GICKING
Counsel of Record
RICHARD A. KRAEMER
MARSHALL, DENNEHEY, WARNER,
COLEMAN & GOGGIN
1845 Walnut Street
Philadelphia, PA 19103
(215) 575-2703

Counsel for Respondents
Frederick P. Rooney
and James J. Burke

(3)

No. 04-356

Supreme Court, U.S.
FILED
DEC 21 2004
OFFICE OF THE CLERK

In The

Supreme Court of the United States

OSCAR W. EGERVARY,

Petitioner,

v.

VIRGINIA YOUNG, JAMES SCHULER, FREDERICK P. ROONEY, JAMES J. BURKE, JEFFREY C. NALLIN, AND JOHN DOES ONE-TEN,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

REPLY TO BRIEFS IN OPPOSITION

Gary L. Azorsky
Counsel of Record
Casey M. Preston
BERGER & MONTAGUE, P.C.
1622 Locust Street
Philadelphia, PA 19103
(215) 875-3000

Counsel for Petitioner

THE LEX GROUP^{DC} ♦ 1750 K Street, NW ♦ Suite 475 ♦ Washington, DC 20006
(202) 955-0001 ♦ Fax: (202) 789-1911 ♦ www.thelexgroupdc.com

TABLE OF CONTENTS

Page

TABLE OF CONTENTS i

TABLE OF AUTHORITIES ii

Petitioner Challenges The Third Circuit's Decision That Respondents Are Absolutely Immune From Damages Liability Under *Bivens* For Their Execution Of The Unconstitutional Warrant On The Basis That Such Actions Were "Shrouded . . . With A Cloak Of Legitimacy." 1

Proximate Cause Could Not Have Been The Basis Upon Which The Third Circuit Granted Respondents Summary Judgment With Regard To Their Post-Approval Conduct 4

The Potential Availability Of A Speculative Diplomatic Process Through Which Petitioner Could Attempt To Obtain The Return Of His Son Does Not Preclude Petitioner From Recovering Civil Damages Under *Bivens* For The Violation Of His Constitutional Rights 5

Respondents' Speculation Over Potential Defenses Should Not Prevent Correction Of The Third Circuit's Egregious Error Which, If Left Standing, Will Have Far Reaching Implications 7

CONCLUSION 8

TABLE OF AUTHORITIES

Page(s)

Cases:

Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics, 403 U.S. 388 (1971) ..... *passim*

Correctional Services Corp. v. Malesko, 534 U.S. 61 (2001) 6

Malley v. Briggs, 475 U.S. 335 (1986) 3

Stanley v. Illinois, 405 U.S. 645 (1972) 7

Wyatt v. Cole, 504 U.S. 158 (1992) 3

Statute:

42 U.S.C. § 1983 3

Constitutional Provisions:

U.S. CONST. amend. IV 6

U.S. CONST. amend. V 1

Petitioner Challenges The Third Circuit's Decision That Respondents Are Absolutely Immune From Damages Liability Under *Bivens* For Their Execution Of The Unconstitutional Warrant On The Basis That Such Actions Were "Shrouded . . . With A Cloak Of Legitimacy."

This case involves the violation of petitioner's Fifth Amendment right to due process of law caused by government actors' execution of an unconstitutional warrant that authorized the taking of petitioner's infant son from his possession and removal from the country without any notice or opportunity to be heard. The respondents include State Department employees Virginia Young and James Schuler ("federal respondents") and private attorneys Frederick Rooney, James Burke ("attorney respondents") and Jeffrey Nallin.[1]

The facts of this case, as relevant to and outlined in greater detail in the petition, consist of four events: (1) respondents' preparation and presentation to the court of an unconstitutional warrant in lieu of writ of habeas corpus ("*pre-approval* conduct"); (2) the court's approval of the unconstitutional warrant; (3) respondents' execution of the unconstitutional warrant ("*post-approval* conduct"); and (4) the harm caused to petitioner by respondents' execution of the unconstitutional warrant.

With respect to the *pre-approval* conduct, the Third Circuit determined that although respondents' preparation and presentation of the unconstitutional warrant was "clearly a cause of [petitioner's] harm," the judge's approval of the warrant after "independent judicial review" was an intervening, superceding cause that broke the chain of causation for purposes of *Bivens* liability. (Pet. App. A23). Thus, in reaching its decision that respondents could not be liable for their *pre-approval* conduct, the Third Circuit

---

[1] Mr. Nallin did not file a response to the petition.

applied the tort law principle of superceding cause. Although petitioner disagrees - from both a factual[2] and legal perspective - with the Third Circuit's decision regarding respondents' *pre-approval* conduct, petitioner does *not* challenge that decision in his petition.

Instead, the question presented in the petition concerns the Third Circuit's unreasoned determination that respondents cannot be liable for damages under *Bivens* for their *post-approval* conduct, or the execution of the unconstitutional warrant, because "the judge's approval of the *ex parte* Order . . . shrouded any subsequent actions with a cloak of legitimacy . . . ." (Pet. App. A24). As discussed fully in the petition, the Third Circuit, by deciding that respondents cannot be liable under any set of circumstances for their *post-approval* conduct, effectively extended absolute immunity to federal officers who present a warrant to a court and then execute the warrant and who knew or should have known that the execution of the warrant would result in a constitutional violation. This extension of absolute

---

[2] The Third Circuit overlooked the following critical testimony from the Honorable William J. Nealon which could cause a reasonable jury to conclude that Judge Nealon's decision was influenced by a factual misrepresentation. Judge Nealon summarized what Mr. Rooney represented to him upon presenting the unconstitutional warrant as follows:

> . . . I thought he said he was retained, at least that's the impression I got, by the State Department to present this petition that there had been a proceeding in Hungary where a — at which the father was represented. And the court awarded custody to the mother and that the father went over to Hungary, kidnapped the youngster and took the youngster back and was now located up in Cresco in Monroe County.

(Court of Appeals Appendix 619). In fact, contrary to Mr. Rooney's representation to the court, there was no Hungarian court order at the time that petitioner rescued his child from abduction by the mother in Hungary.

immunity violates fundamental Supreme Court jurisprudence which commands that before extending absolute immunity to government actors from damages liability for unconstitutional behavior a court must engage in a two-part inquiry. *See Wyatt v. Cole*, 504 U.S. 158, 163-64 (1992). The initial inquiry is whether the "tradition of immunity was so firmly rooted in the common law and was supported by such strong policy reasons that Congress would have specifically so provided had it wished to abolish the doctrine." *Wyatt*, 504 U.S. at 164. If an official was indeed accorded immunity from tort actions at common law when the Civil Rights Act was enacted in 1871, the second inquiry is whether the history and purpose of *Bivens* and Section 1983 counsel against recognizing the same immunity in these actions. *Malley v. Briggs*, 475 U.S. 335, 340 (1986).

Respondents do not dispute that, had the Third Circuit applied well-established precedent, it would have determined that common law did not recognize an immunity analogous to the rule it created. Nor do respondents disagree that, had it applied well-established precedent, the Third Circuit would have learned that extending absolute immunity to government actors who obtain and execute unconstitutional warrants or court orders is inconsistent with the history and purpose of *Bivens* and Section 1983. Indeed, much of respondents' opposition briefs are dedicated to defending the Third Circuit's unchallenged application of the principle of superceding cause to their *pre-approval* conduct. Rather than confront the question raised by the petition, respondents attempt to distract the Court from the Third Circuit's egregious disregard of fundamental Supreme Court precedent.[3] In so doing, respondents completely side-step the Third Circuit's

---

[3] In fact, the federal respondents submit a reformulated question presented focused solely upon the Third Circuit's proximate cause analysis.

remarkable holding that the district court's approval of the unconstitutional order "shrouded any subsequent actions with a cloak of legitimacy."

Proximate Cause Could Not Have Been The Basis Upon Which The Third Circuit Granted Respondents Summary Judgment With Regard To Their Post-Approval Conduct

Respondents argue that summary reversal or *certiorari* should not be granted simply because the Third Circuit prefaced its opinion by expressly stating that it need not consider absolute immunity arguments inasmuch as the issue of proximate cause is determinative. (*See* federal respondents' brief ("Fed. Resp. Brf.") at 11 (citing Pet. App. A13-14); attorney respondents' brief ("Atty. Resp. Brf.") at 16 (citing Pet. App. A14)).[4] Thus, according to respondents, the Third Circuit determined that they could not be liable for their *post-approval* conduct because such actions did not proximately cause petitioner's harm. However, the very terms of the Third Circuit's analysis demonstrate that the appellate panel only applied the superceding cause principle to *pre-approval* conduct and not to *post-approval* conduct:

> Traditionally, in tort law, "proximate cause" has been defined as a person's wrongful conduct which is a substantial factor in

---

[4] Specifically, the Third Circuit prefaced its opinion by stating:

> Defendants raise a number of defenses to the claims asserted against them, including lack of venue, waiver, absolute immunity, qualified immunity, and good faith. However, we need not reach any of these issues, as we conclude that Egervary, by failing to demonstrate proximate cause with respect to any defendant, has failed to establish an essential element of his claim.

(Pet. App. A14 (footnote omitted)).

> bringing about harm to another. *See* Restatement (Second) of Torts § 431 (1965). However, an intervening act of a third party, which actively operates to produce harm *after* the first person's wrongful act has been committed, is a superseding cause which prevents the first person from being liable for the harm which his *antecedent* wrongful act was a substantial factor in bringing about. *See* Restatement (Second) of Torts § 440-441 (1965).

(Pet. App. A14 (emphasis added)). Consequently, the district court's error in approving the unconstitutional warrant was not – and logically could not have been – a superceding cause of harm to petitioner by reason of respondents' *post-approval* conduct. Respondents' suggestions that the Third Circuit's causation analysis applied to their *post-approval* conduct are simply not borne out by the appellate panel's opinion.

The Potential Availability Of A Speculative Diplomatic Process Through Which Petitioner Could Attempt To Obtain The Return Of His Son Does Not Preclude Petitioner From Recovering Civil Damages Under *Bivens* For The Violation Of His Constitutional Rights

The Third Circuit mentioned in dictum that petitioner was not left without a remedy after his child was unconstitutionally removed from the United States by or with the assistance of respondents. (*See* Pet. App. A24). The attorney respondents contend that, as a result of the existence of an alternative available remedy, a *Bivens* action need not be inferred. (*See* Atty. Resp. Brf. at 21 (citing Pet. App. A25)). Aside from its obvious irrelevance to the issue of the Third Circuit's expansion of absolute immunity, this argument is irrelevant to the petition in several other respects.

First and foremost, the attorney respondents misconstrue this Court's rulings regarding alternative available remedies. The attorney respondents cite *Correctional Services Corp. v. Malesko*, 534 U.S. 61, 67-68 (2001) in support of their position. The Court in that case discussed the availability of alternative remedies to the constitutional deprivation giving rise to a *Bivens* claim. *See id.* at 72-74. The Court distinguished between the alternative state court remedies that were "inconsistent or even hostile" to a remedy inferred from the Fourth Amendment in the original *Bivens* case ("When a federal officer appears at the door and requests entry, one cannot always be expected to resist. . . . Yet lack of resistence alone might foreclose a cause of action in trespass or privacy") to the alternative tort remedy available to the federal prisoner in *Malesko* which was not pursued due solely to strategic choice. *See id.* at 73-74. In the present action, as in the original *Bivens* action, petitioner could have attempted to resist the actions of the federal officers and attorney respondents acting under color of federal law, but resistence, giving rise to potential state law remedies of trespass and privacy, may have amounted to a crime. *See id.* at 73. Thus, the only remedy to his harm is available through the implied constitutional tort remedy under *Bivens*.

Indeed, the remedy proposed by the Third Circuit is not a remedy for petitioner's constitutional harm at all. Rather, it amounts to nothing more than speculation as to how an appeal of the district court's order may have resulted – through an order entered by a court with no jurisdiction to enforce its order over foreign entities, and then through diplomatic efforts to be undertaken by the same Department of State which aided in the removal of petitioner's child in the first place – in the eventual return of petitioner's child. Even such a fanciful result, however, would not have erased the constitutional violation or

remedied the violation of petitioner's constitutional right to due process of law. *See Stanley v. Illinois*, 405 U.S. 645, 647 (1972) (recognizing that the Court does not "embrace[] the general proposition that a wrong may be done if it can be undone. . . . [I]f there is delay between the doing and the undoing petitioner suffers from the deprivation of his children, and the children suffer from uncertainty and dislocation"). Thus, an appeal that does not remedy the constitutional injury is not an alternative available remedy at all.

Respondents' Speculation Over Potential Defenses Should Not Prevent Correction Of The Third Circuit's Egregious Error Which, If Left Standing, Will Have Far Reaching Implications

Respondents argue that this petition should not be granted because, irrespective of the Third Circuit's decision regarding proximate causation, the attorney respondents acted in good faith (*see* Atty. Resp. Brf. at 23) and the federal respondents are entitled to qualified immunity (*see* Fed. Resp. Brf. at 16). The district court in this case, however, determined that the question of whether the attorney respondents are entitled to a defense of good faith is a fact question as to which summary judgment is inappropriate and which must therefore be decided by a jury. (*See* Pet. App. E13). Moreover, petitioner raised on appeal to the Third Circuit the question as to whether the defense of good faith is legally available to the attorney respondents, but the court did not reach that issue in its decision. Similarly, although the federal respondents express confidence in their qualified immunity defense and assert that "there is no basis upon which to deny [them] qualified immunity," the district court and petitioners strongly disagree. (*See* Pet. App. D54-D75). Like the good faith defense, the Third Circuit did not analyze or rule upon the qualified immunity issue. In short, these defenses, as to which the record is rife with

contradicting facts, are not ripe for adjudication or determination at this juncture.

CONCLUSION

For the foregoing reasons and those stated in the petition for writ of *certiorari*, petitioner respectfully requests that the decision of the Third Circuit be summarily reversed in this case. In the alternative, the petition for writ of *certiorari* should be granted to examine the Third Circuit's unexplained expansion of absolute immunity.

Respectfully submitted,

GARY L. AZORSKY
Counsel of Record
CASEY M. PRESTON
BERGER & MONTAGUE, P.C.
1622 Locust Street
Philadelphia, PA 19103

Counsel for Petitioner

December 21, 2004